

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

(No. 426

**MILK CONTROL BOARD OF THE COMMONWEALTH
OF PENNSYLVANIA, PETITIONER,**

vs.

EISENBERG FARM PRODUCTS

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMON-
WEALTH OF PENNSYLVANIA**

PETITION FOR CERTIORARI FILED OCTOBER 18, 1938.

CERTIORARI GRANTED NOVEMBER 21, 1938.



SUPREME COURT OF THE UNITED STATES

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OF PENNSYLVANIA, PETITIONER,

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EISENBERG FARM PRODUCTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE COMMONWEALTH OF PENNSYLVANIA

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**IN SUPREME COURT OF PENNSYLVANIA, MIDDLE
DISTRICT**

MAY TERM, 1938

No. 22

MILK CONTROL BOARD OF THE COMMONWEALTH OF PENNSYLVANIA, Appellant,

vs.

**EISENBERG FARM PRODUCTS, a Pennsylvania Corporation,
Appellee**

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Prothonotary of the Supreme Court of Pennsylvania :

In making up the transcript for transmission to the United States Supreme Court in the above entitled cause, you will incorporate the following :

- Docket entries.
- Appeal and affidavit.
- Notice of appeal etc.
- Assignments of error.
- Record—Court of Common Pleas of Dauphin County.
- Opinion by Kephart, C. J. Supreme Court.
- Petition for Rehearing and Reargument.
- Order denying reargument.
- Petition to hold record pending appeal to Supreme Court of the United States.
- Order holding record.
- Petition to extend time for holding record, etc.
- Order extending time for holding record.
- Praecipe indicating portions of record to be incorporated into transcript, with service thereof.

(Signed) Harry Polikoff, Counsel for Appellant.

Service of copy of the above Praecipe is hereby acknowledged this 13th day of October, 1938.

(Signed) Caldwell, Fox & Stoner, Counsel for Appellee. M. Yoffee.

[fol. 1] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

(Appeal of Milk Control Commission of the Commonwealth of Pennsylvania, Plaintiff, from the decree)

DOCKET ENTRIES—Filed December 17, 1937

Eo die Certiorari exit.

Returnable 21st Monday of the year.

Jan. 12, 1938. Notice of Appeal, etc. filed.

May 13, 1938. Assignments of Error filed.

May 13, 1938. Praeceptum for appearance entered by Guy K. Bard, Attorney General, for Appellant.

May 18, 1938. Record returned and filed.

May 23, 1938. Continued at bar, to be heard June 17, 1938 at Phila.

May 31, 1938. Certificate of Transfer exit to Phila.

June 17, 1938. Argued in Phila.

June 30, 1938. "Decree affirmed at appellant's cost. Kephart, C. J."

July 11, 1938. Petition for Reargument filed. Harry Polikoff.

July 25, 1938. Reargument refused. Per Curiam.

July 26, 1938. Petition to hold record pending appeal to the Supreme Court of United States filed. Harry Polikoff.

July 29, 1938. Petition granted for period of thirty days.

Sept. 1, 1938. Petition to extend time for holding record pending appeal, etc., filed. Chas. J. Ware, Asst. Dep. Atty. Gen.

Sept. 1, 1938. Petition granted for additional sixty days.

Charles J. Margiotti, Harry Polikoff, Chas. J. Ware,
Attorneys for Appellant. Caldwell, Fox & Stoner,
Attorneys for Appellee.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 2] IN SUPREME COURT OF PENNSYLVANIA

ENTRY OF APPEAL

Enter appeal on behalf of Milk Control Commission of the Commonwealth of Pennsylvania, from the decree of the

Court of Common Pleas of the County of Dauphin Returnable.

Harry Polikoff, Attorney for Appellant.

To Paul W. Orth, Prothonotary

SUPREME COURT, MIDDLE DISTRICT

COUNTY OF DAUPHIN, ss:

Harry Polikoff, being duly sworn saith that said Appeal is not taken for the purpose of delay, but because Appellant believes it has suffered injustice by the Decree from which it appeals and subscribed, this — day of December A. D. 1937.

Harry Polikoff.

[fol. 3] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

NOTICE OF APPEAL

To the appellee or his Counsel:

You are hereby notified that on December 17, 1937, an appeal was taken to the above court in the above-entitled case.

Harry Polikoff, Attorney for Appellant.

January 12, 1938, Service of the foregoing notice is hereby accepted; and the Prothonotary of the above court is directed to enter the appearance of the undersigned for the appellee.

Caldwell, Fox & Stoner.

[fol. 4] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ASSIGNMENTS OF ERROR

And Now, comes the appellant in the above captioned case and makes the following assignments of error:

1. The learned Court below erred in overruling the plaintiff's exception to the Chancellor's first conclusion of law, which exception and ruling thereon are as follows (a, a):

"1. Plaintiff excepts to the learned chancellor's first conclusion of law, which reads:

" '1. All of the transactions of the defendant including the purchase of milk from the Pennsylvania farmer-pro-

ducers, within the Commonwealth of Pennsylvania, constitute interstate commerce.' "

Ruling:

"And now, December 7, 1937, the plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree.

By the Court in Banc.

W. C. Sheely, P. J. Fifty-first Judicial District, Specially Presiding."

2. The learned Court below erred in overruling the plaintiff's exception to the Chancellor's second conclusion of law, which exception and ruling thereon are as follows (a, a):

[fol. 5] "2. Plaintiff excepts to the learned chancellor's second conclusion of law, which reads:

"2. The regulations sought to be imposed upon the defendant by the plaintiff, including the taking out of a license as provided by the Act of April 26, 1937, posting a bond conditioned for the payment of all amounts due to farmers under the Act and under orders of the Milk Control Commission, and to pay such milk prices to the farmers as is required by the Commission would constitute a regulation of and a burden upon interstate commerce.' "

Ruling:

"And now, December 7, 1937, the plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree.

By the Court in Banc:

W. C. Sheely, P. J. Fifty-first Judicial District, Specially Presiding."

3. The learned Court below erred in overruling the plaintiff's exception to the Chancellor's third conclusion of law, which exception and ruling thereon are as follows (a, a):

"3. Plaintiff excepts to the learned chancellor's third conclusion of law, which reads:

"3. The defendant, in its operations as described in the Case Stated, is not subject to the jurisdiction or con-

trol of the Milk Control Commission of the Commonwealth of Pennsylvania in the matters complained of by the plaintiff.' "

Ruling:

"And now, December 7, 1937, the plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree.

By the Court in Banc:

W. C. Sheely, P. J. Fifty-first Judicial District, Specially Presiding."

[fol. 6] 4. The learned Court below erred in overruling the plaintiff's exception to the decree nisi, which exception and ruling thereon are as follows (a, a):

"4. Plaintiff excepts to the learned chancellor's decree nisi, which is as follows:

" 'And Now, August 23rd, 1937, upon consideration of the foregoing case, it is ordered, adjudged and decreed that judgment therein shall be entered in favor of the defendant as stipulated in the Case Stated, and that the plaintiff's bill of complaint be and the same is hereby dismissed at the cost of the plaintiff.' "

Ruling:

"And now, December 7, 1937, the plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree.

By the Court in Banc:

W. C. Sheely, P. J. Fifty-first Judicial District, Specially Presiding."

[fols. 7-8] 5. The learned Court below erred in entering the following final decree (a, a):

"And Now, December 7, 1937, the plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree.

By the Court in Banc:

W. C. Sheely, P. J. Fifty-first Judicial District, Specially Presiding."

Respectfully submitted, Guy K. Bard, Attorney General; Harry Polikoff, Deputy Attorney General; Charles J. Ware, Assistant Deputy Attorney General, by Harry Polikoff.

[fol. 9] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

DOCKET ENTRIES

August 21, 1936. Bill and Injunction Affidavits filed, same day rule granted on the defendant to show cause why a preliminary injunction should not issue as prayed, returnable September 2, 1936.

August 22, 1936. Issuance of Rule waived and service accepted by Caldwell, Fox and Stoner, attorney- for the defendant. See file.

September 9, 1936. Answer to Bill of Complaint filed, same day service accepted by Harry Polikoff, attorney for the Milk Control Board.

December Term 1936, argument list December 10, 1936 continued January Term 1937, argument list.

February 11, 1937. Case Stated, see file.

August 23, 1937. It is ordered, adjudged and decreed that judgment therein shall be entered in favor of the defendant as stipulated in case stated and that plaintiff's Bill of Complaint be and the same is hereby dismissed at the cost of the plaintiff. It is further ordered that the prothonotary shall enter above decree nisi and give notice of entry thereof to parties and if no exceptions be filed thereto by either party within ten days after such notice is given the decree entered nisi shall be entered as an absolute decree, see decree filed.

August 31, 1937. Stipulations of counsel filed extending the time to file exceptions to the adjudication and decree of court to September 20, 1937. See file.

[fol. 10] September 20, 1937. Plaintiff's exceptions to adjudication and decree filed. October Term 1937 argument list.

December 7, 1937. Plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree. See opinion file.

December 7, 1937. Exception to the final decree is noted for plaintiff, see file.

January 12, 1938. Certiorari from Supreme Court to No. 22 May Term 1938 filed.

IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

BILL OF COMPLAINT

Howard C. Eisaman, Howard C. Reynolds and John J. Snyder, constituting the Milk Control Board of the Commonwealth of Pennsylvania, orators herein, do complain and say:

1. Eisenberg Farm Products, a Pennsylvania corporation, is a milk dealer engaged in the business of buying and selling milk in and about Elizabethville, County of Dauphin, Commonwealth of Pennsylvania.

2. Said milk dealer does not have a license to do business as a milk dealer in the Commonwealth of Pennsylvania, and has been operating without such license since May 1, 1935.

3. Said milk dealer does not have on file with the Commonwealth, and never has filed, the bond required by law [fol. 11] for the protection of milk producers from whom the said dealer purchases milk.

4. Said milk dealer is unlawfully paying to milk producers prices below the minimum prescribed in the official general orders of the Milk Control Board, and never has paid to milk producers prices at or above the minimum so prescribed; true and correct copies of said orders are attached hereto, made part hereof, and marked Exhibit "A."

5. Said milk dealer does not file the reports, and does not keep the records, required by the official general orders of the Milk Control Board, and never has filed such reports or kept such records.

6. The said milk dealer unlawfully has failed and refused, and continues to fail and refuse, to comply with the Milk Control Board Law and with the rules, regulations and official general orders of the Milk Control Board, in each of the aforesaid particulars.

7. Such continuing violations of law by said milk dealer undermine the price structure of dairy farmers in the Commonwealth, causing irreparable injury.

8. Such continuing violations of law by said milk dealer prevent its milk producers from securing the cost of sani-

tary production for their milk and tend to lower the sanitary quality of the milk sold to consumers by said dealer, causing irreparable injury.

9. No remedy at law is adequate to halt said illegal practices in order to protect the public health and interest herein, [fol. 12] and to prevent the irreparable injury aforesaid.

Wherefore your orators pray equitable relief as follows:

1. That an injunction may issue preliminary until hearing, and perpetual thereafter, restraining the said dealer, its officers, agents, employes, assigns, from purchasing or handling milk for sale, processing or manufacture, and from otherwise dealing in milk.

2. Such other further relief as the equity in this case may require, and as to your Honorable Court seems proper.

Charles J. Margiotti, Attorney General. Harry Polikoff, Deputy Attorney General.

Duly sworn to by Edwin H. Ridgway. Jurat omitted in printing.

[fol. 13] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

RULE TO SHOW CAUSE

And Now, to wit, the 21st day of August, 1936, upon motion of Charles J. Margiotti, Attorney General, and Harry Polikoff, Deputy Attorney General, attorneys for the Milk Control Board of the Commonwealth of Pennsylvania, a rule is issued directing Eisenberg Farm Products, a Pennsylvania corporation, to show cause why a preliminary injunction should not issue restraining the said Eisenberg Farm Products, its officers, agents, employes and assigns, from purchasing or handling milk for sale, process or manufacture, and from otherwise dealing in milk in the Commonwealth of Pennsylvania.

Returnable the 2nd day of September, 1936.

Fred S. Reese, P. J., 9th Judicial District, Specially Presiding.

[fol. 14] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

Injunction Affidavits

AFFIDAVIT OF NORMAN W. LYON

Norman W. Lyon, Secretary of the Milk Control Board of the Commonwealth of Pennsylvania, being duly sworn according to law, deposes and says:

1. Eisenberg Farm Products, a Pennsylvania corporation, is a milk dealer engaged in the business of buying and selling milk in and about Elizabethville, County of Dauphin, Commonwealth of Pennsylvania.

2. Said milk dealer does not have, and never has had, a license to do business as a milk dealer in the Commonwealth of Pennsylvania, as required by law, since May 1, 1935.

3. Said milk dealer does not have on file with the Commonwealth, and never has filed, the bond required by law for the protection of milk producers from whom the said dealer purchases milk.

4. Said milk dealer is unlawfully paying to milk producers, prices below the minimum prescribed in the official general orders of the Milk Control Board, and never has paid to milk producers, prices at or above the minimum so prescribed.

5. Said milk dealer does not file the reports, and does not keep the records, required by the official general orders of the Milk Control Board, and never has filed such reports or kept such records.

[fol. 15] 6. The said milk dealer unlawfully has failed and refused, and continues to fail and refuse, to comply with the Milk Control Board Law and with the rules, regulations and official general orders of the Milk Control Board, in each of the aforesaid particulars.

7. Such continuing violations of law by said milk dealer undermine the price structure of dairy farmers in the Commonwealth, causing irreparable injury.

8. Such continuing violations of law by said milk dealer prevent its milk producers from securing the cost of sanitary production for their milk and tend to lower the sani-

tary quality of the milk sold to consumers by said dealer, causing irreparable injury.

9. No remedy at law is adequate to halt said illegal practices in order to protect the public health and interest herein, and to prevent the irreparable injury aforesaid.

All of which your deponent avers to be true and correct to the best of his knowledge, information and belief.

Norman W. Lyon.

Sworn to and subscribed before me this 17th day of August, 1936. Miss Lucille A. Stroup, Notary Public. My commission expires March 5, 1939. (Seal.)

[fol. 16] AFFIDAVIT OF EARL W. MAXWELL

Earl W. Maxwell, Assistant Director of the Bureau of Audits and Investigations of the Milk Control Board of the Commonwealth of Pennsylvania, being duly sworn according to law, deposes and says:

1. Eisenberg Farm Products, a Pennsylvania corporation, is a milk dealer engaged in the business of buying and selling milk in and about Elizabethville, County of Dauphin, Commonwealth of Pennsylvania.

2. Said milk dealer does not have, and never has had, a license to do business as a milk dealer in the Commonwealth of Pennsylvania, as required by law, since May 1, 1935.

3. Said milk dealer does not have on file with the Commonwealth, and never has filed, the bond required by law for the protection of milk producers from whom the said dealer purchases milk.

4. Said milk dealer is unlawfully paying to milk producers prices below the minimum prescribed in the official general orders of the Milk Control Board, and never has paid to milk producers prices at or above the minimum so prescribed.

5. Said milk dealer does not file the reports, and does not keep the records, required by the official general orders of the Milk Control Board, and never has filed such reports or kept such records.

[fol. 17] 6. The said milk dealer unlawfully has failed and refused and continues to fail and refuse, to comply with the Milk Control Board Law and with the rules, regulations and official general orders of the Milk Control Board, in each of the aforesaid particulars.

7. Such continuing violations of law by said milk dealer undermine the price structure of dairy farmers in the Commonwealth, causing irreparable injury.

8. Such continuing violations of law by said milk dealer prevent its milk producers from securing the cost of sanitary production for their milk and tend to lower the sanitary quality of the milk sold to consumers by said dealer, causing irreparable injury.

9. No remedy at law is adequate to halt said illegal practices in order to protect the public health and interest herein, and to prevent the irreparable injury aforesaid.

All of which your deponent avers to be true and correct to the best of his knowledge, information and belief.

Earl W. Maxwell.

Sworn to and subscribed before me this 17th day of August, 1936. Miss Lucille A. Stroup, Notary Public. My commission expires March 5, 1939. (Seal.)

[fol. 18] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

ANSWER TO BILL OF COMPLAINT

And Now, comes Eisenberg Farm Products, a Pennsylvania corporation, defendant in the above entitled action, and makes answer to the bill of complaint as follows:

1. Denied. The defendant is engaged in the business of buying milk at its Elizabethville plant, but said milk is sold in New York State and constitutes interstate commerce.

2. Admitted, but defendant avers that inasmuch as it is engaged solely in interstate commerce, it is not required to obtain a license in the Commonwealth of Pennsylvania.

3. Admitted, for the reason that it is engaged in interstate commerce and hence is not required to file said bond.

4. Denied. Defendant avers that it is paying fair, just and satisfactory prices to its farmers, with which they are well satisfied. Defendant is unable to state whether or not it is paying the prices prescribed in the official general orders of the Milk Control Board, because it is not aware of the disposition of the milk sold by it in New York State and further avers that its purchasers in New York State are not obligated to advise the defendant of the disposition of the milk sold to the said purchasers because they are not subject to regulation by the Pennsylvania Milk Control Board. Since the Milk Control Board price is regulated by the ultimate disposition of the milk, defendant, as above [fol. 19] stated, cannot obtain the information necessary to answer this allegation.

5. Defendant does not file the reports and does not keep the records referred to in this allegation, because it has no way of obtaining the information necessary to compile said reports since the milk is disposed of without the Commonwealth of Pennsylvania and the purchasers are not obligated and refuse to furnish information as to its disposition.

6. Defendant denies these allegations generally and says that it is doing all it is required to do since it is engaged in interstate commerce and is not subject to the regulations and control of the Milk Control Board.

7. Denied. Defendant avers that prices paid by it to its farmers are entirely satisfactory to the said farmers and cause no injury to anyone.

8. Denied. Defendant avers that its prices paid to its producers are entirely adequate to permit them to secure the cost of sanitary production and further denies that the sanitary quality of the milk is lowered in any way.

9. Denied. Defendant avers that plaintiff has already instituted a criminal prosecution against defendant, which action is now pending before your Honorable Court and further avers that no irreparable injury exists. Defendant further avers that the public health and interest is not in any way endangered and proof thereof is demanded if material.

[fol. 20] Wherefore, defendant prays that the bill be dismissed at the cost of the plaintiff.

And it will ever pray.

Eisenberg Farm Products, a Pennsylvania Corporation, (S.) by Samuel Kamphy, President.

Duly sworn to by Samuel Kamphy. Jurat omitted in printing.

[fol. 21] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

AGREED STATEMENT OF CASE

The parties to this Case Stated, by their attorneys, agree the following facts:

1. The plaintiff is the Milk Control Board of the Commonwealth of Pennsylvania.
2. The defendant is a Pennsylvania corporation.
3. The defendant leases from the Daubert Realty Company a milk receiving plant in Elizabethville, Pennsylvania.
4. The defendant buys milk from farmers at the aforesaid plant in Elizabethville, Pennsylvania.
5. The milk is brought to the plant by the farmers in their own cans, at which point it is weighed and tested by the defendant.
6. At the plant the milk is dumped into receiving tanks. In these tanks the milk is cooled down to approximately 32° to 35°, but is not processed in any way whatever.
7. The cooling aforesaid is not for the purpose of changing the milk or its constituent parts in any manner whatever, but is done for the sole purpose of preventing the growth of bacteria during shipment of the milk and thereafter.
8. The milk hereinbefore referred to is retained in the Elizabethville plant for a period of less than twenty-four hours, and is thereupon immediately shipped to New York [fol. 22] City, New York State, in tank trucks operated for the defendant, for resale in said city.
9. The journey of these tank trucks is continuous from Elizabethville, Pennsylvania, to New York City, New York.

10. None of the milk purchased from the defendant corporation at its Elizabethville plant as aforesaid, is sold within the Commonwealth of Pennsylvania, but all of it is sold as heretofore stated, in the state of New York.

11. Approximately ten thousand quarts of milk are received each day from approximately one hundred and seventy-five farmers, resident in the State of Pennsylvania.

12. Approximately 4,500,000,000 pounds of milk were produced in Pennsylvania in 1934. Of this amount, approximately 470,000,000 pounds were shipped to other states. The relationship of these amounts has not altered materially since 1934, although slightly more milk is being shipped from Pennsylvania to New York at present.

13. Defendant has been doing business at Elizabethville, Pennsylvania, in the manner indicated, for a period of more than three years.

14. The plaintiff has attempted to apply the provisions of the Milk Control Board Law, 1935, P. L. 96, to the defendant corporation, by requiring it to take out a license as a milk dealer as defined in said Act, post a bond conditioned [fol. 23] for the payment of all amounts due to farmers under the Act and orders of the Board, and to pay such milk prices to the farmers as is required by the Board.

15. The defendant has refused to do any of the things enumerated in the preceding paragraph, advancing the following arguments in support of its position:

(a) It is engaged in interstate commerce purely, and is not subject to the control of the Pennsylvania Milk Board because the requirements of the Board as hereafter enumerated would constitute a burden upon interstate commerce.

(b) The license fees required by the Board would constitute a burden upon interstate commerce.

(c) The cost of procuring bond, which, however, the company is unable to do, would constitute a burden upon interstate commerce.

(d) The orders of the Board establishing prices to be paid by the defendant to the farmers would constitute a burden upon interstate commerce because such prices are

in excess of the prices for which the aforesaid farmers are now and have been selling their milk to the defendant.

The following questions are, therefore, submitted for the determination of your Honorable Court:

1. Is the defendant wholly engaged in interstate commerce?

[fol. 24] 2. Is the defendant, under the circumstances above set forth, required to take out a license as a milk dealer within the provisions of the Act as hereinbefore referred to, and generally comply with the provisions of the said Act or any part thereof (including the orders issued thereunder)?

If the Court shall be of the opinion that the defendant is engaged in interstate commerce and is not required to take out a license or otherwise comply with said Act, then the Court is respectfully requested to enter judgment in favor of the defendant. If the Court shall be of the opinion that the defendant is not engaged in interstate commerce, or is required to take out a license or otherwise comply with the said Act, then the Court is respectfully requested to enter judgment in favor of the plaintiff.

Each party reserves the right of appeal.

Harry Polikoff, Attorney for Plaintiff. Caldwell,
Fox, Stoner, Attorneys for Defendant.

[fol. 25] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

Adjudication and Decree

STATEMENT OF PLEADINGS

This case arose originally upon a bill of complaint filed by the Commonwealth, praying that a preliminary injunction issue restraining the defendant corporation from doing business in the Commonwealth of Pennsylvania. Injunction affidavits were filed in support of the bill. The plaintiff and the defendant agreed to a "Case Stated" under Equity Rule 32, upon which argument was held as upon a final hearing.

The Case Stated eliminated any issues of fact, and raised only questions of law which were thereby submitted to the Court for determination.

Based on the Case Stated filed the Court makes the following

FINDINGS OF FACT

1. The plaintiff is the Milk Control Board of the Commonwealth of Pennsylvania, now the Milk Control Commission of the Commonwealth of Pennsylvania.

2. The defendant is a Pennsylvania corporation.

3. The defendant leases from the Daubert Realty Company, a milk receiving plant in Elizabethville, Pennsylvania.

4. The Defendant buys milk from farmers at the aforesaid plant in Elizabethville, Pennsylvania.

[fol. 26] 5. The milk is brought to the plant by the farmers in their own cans, at which point it is weighed and tested by the defendant.

6. At the plant the milk is dumped into receiving tanks, In these tanks the milk is cooled down to approximately 32° to 35°, but is not processed in any way whatever.

7. The cooling aforesaid is not for the purpose of changing the milk or its constituent parts in any manner whatever, but is done for the sole purpose of preventing the growth of bacteria during shipment of the milk and thereafter.

8. The milk hereinbefore referred to is retained in the Elizabethville plant for a period of less than twenty-four hours, and is thereupon immediately shipped to New York City, New York State, in tank trucks operated for the defendant, for resale in said city.

9. The journey of these tank trucks is continuous from Elizabethville, Pennsylvania, to New York City, New York.

10. None of the milk purchased from the defendant corporation at its Elizabethville plant as aforesaid, is sold within the Commonwealth of Pennsylvania, but all of it is sold as heretofore stated, in the State of New York.

11. Approximately ten thousand quarts of milk are received each day from approximately one hundred and sev-

[fol. 27] enty-five farmers, resident in the State of Pennsylvania.

12. Approximately 4,500,000,000 pounds of milk were produced in Pennsylvania in 1934. Of this amount, approximately 470,000,000 pounds were shipped to other states. The relationship of these amounts has not altered materially since 1934, although slightly more milk is being shipped from Pennsylvania to New York at present.

13. Defendant has been doing business at Elizabethville, Pennsylvania, in the manner indicated, for a period of more than three years.

14. The plaintiff has attempted to apply the provisions of the Milk Control Board law, 1935 P. L. 96, to the defendant corporation, by requiring it to take out a license as a milk dealer as defined in said Act, post a bond conditioned for the payment of all amounts due to farmers under the Act and orders of the Board, and to pay such milk prices to the farmers as is required by the Board.

15. The defendant has refused to do any of the things enumerated in the preceding paragraph, advancing the following arguments in support of its position:

(a) It is engaged in interstate commerce purely, and is not subject to the control of the Pennsylvania Milk Board because the requirements of the Board as hereafter enumerated would constitute a burden upon interstate commerce.

[fol. 28] (b) The license fees required by the Board would constitute a burden upon interstate commerce.

(c) The cost of procuring bond, which, however, the company is unable to do, would constitute a burden upon interstate commerce.

(d) The orders of the Board establishing prices to be paid by the defendant to the farmers would constitute a burden upon interstate commerce because such prices are in excess of the prices for which the aforesaid farmers are now and have been selling their milk to the defendant.

DISCUSSION

The Case Stated submitted the following questions for the determination of the Court:

1. Is the defendant wholly engaged in interstate commerce?

2. Is the defendant, under the circumstances above set forth, required to take out a license as a milk dealer within the provisions of the Act known as the Milk Control Board Law, approved April 30, 1935, P. L. 96 (reenacted by the Act of April 28, 1937), and generally comply with the provisions of said Act or any part thereof including the orders issued thereunder?

It was stipulated that if the Court should be of the opinion that the defendant is engaged in interstate commerce and is not required to take out a license or otherwise comply with the Act, judgment should be entered in favor of the defendant. If the Court should be of the opinion that the defendant is not engaged in interstate commerce, or is [fol. 29] required to take out a license or otherwise comply with said Act, judgment is to be entered in favor of the plaintiff.

In the present case, the defendant operates a milk-receiving plant at which it buys milk brought to the plant by the farmer-producers. The milk is weighed and tested by the defendant and is then dumped into receiving tanks where it is cooled for the sole purpose of preventing growth of bacteria during shipment. Within a period of twenty-four hours after the milk is received at the plant it is shipped to New York City in tank trucks operated for the defendant for resale in that city.

The plaintiff bases its right to require the defendant to secure a license and to submit to its regulations solely on the ground that the contract between the Pennsylvania farmers and the defendant, a Pennsylvania corporation, consists of an offer and an acceptance, both made in Pennsylvania, which contract is completely performed by both parties within the Commonwealth of Pennsylvania, and is entirely an intrastate transaction. The defendant admits the right of the plaintiff to control the production of the milk. The plaintiff concedes that it has no right to control the milk after it has started its journey to New York, so that the sole question before us is whether the act of purchasing milk in Pennsylvania under the circumstances of this case can be so separated from the transportation of the milk to New York as to constitute a separate transaction, purely intrastate in its nature.

The courts have frequently recognized that a business [fol. 30] may consist of two activities, one intrastate and one

interstate. Thus, in *Utah Power & Light Company v. Pfest*, 286 U. S. 165 (1931) it was held that the production of electrical energy was intrastate while the transmission of that energy into other states was interstate. Also, in *Champlin Refining Company v. Corporation Commission*, 286 U. S. 210 (1931) it was held that oil production was intrastate while the shipping of oil to other states was interstate. Again, in *United States v. Butler*, 297 U. S. 1 (1935) it was held that agricultural production was exclusively a matter of state regulation, notwithstanding the subsequent shipment of that commodity in interstate commerce.

More recently, in *Carter v. Carter Coal Company*, 298 U. S. 238 (1936), the Supreme Court of the United States, referring to the mining of coal, said: "so far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. * * * Mining brings the subject matter of commerce into existence. Commerce disposes of it."

The doctrine of these cases, relied upon by the plaintiff, as applied to the present situation would be that the "production" of milk by the farmers is a matter of local concern, a theory admitted by the defendant. These cases do not fix the exact point at which the transaction becomes interstate in its nature.

We do not believe that the making of the contract for the purchase of the milk can be so separated from the entire transaction as to subject to local regulation without affecting the interstate business. The facts in the present case [fol. 31] are nearly identical with the facts presented in the case of *Lemke v. Farmers' Grain Co.*, 258 U. S. 50 (1921). In that case the defendant was the owner of a grain elevator in the state of North Dakota. It purchased grain at its elevator to be shipped to and sold in markets in other states. After the grain was purchased from the farmer in North Dakota it was placed in the elevator for shipment and was loaded at once upon cars for shipment to places outside the state of North Dakota. The Court there said: "That such course of dealing constitutes interstate commerce, there can be no question." The Court pointed out the distinction between that case and the cases in which it had occasion to define the line between state and Federal authority where the right of state taxation was involved,

and cases where manufacture or commerce of an intrastate nature was the subject of consideration.

The Court in the Lemke case used the following language which effectively disposes of the argument here made by the plaintiff that after the purchase of the milk the defendant could do with it what it pleased and was not bound to ship it to another state. The Court said: "It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions." In the present case the agreed statement of facts stipulate that "none [fol. 32] of the milk purchased by the defendant corporation at its Elizabethville plant as aforesaid, is sold within the Commonwealth of Pennsylvania, but all of it is sold as heretofore stated in the State of New York."

In a similar case, involving practically the same facts, the Court said: "Buying for shipment, and shipping, to markets in other states, when conducted as before shown, constitutes interstate commerce,—the buying being as much a part of it as the shipping." *Shafer v. Farmers Grain Co.*, 268 U. S. 189 (1924).

The same rule is expressed in *United States v. Seven Oaks Dairy Co.*, 10 F. Supp. 995 (1935) by Judge Brewster of the District Court of Massachusetts in a case brought by the United States against the Company seeking to restrain it from engaging in the milk business because of its refusal to comply with a federal milk license. The defendant purchased all of its milk in Vermont with the intention of shipping it into Massachusetts. The milk produced in Vermont was delivered to the Company's receiving station in Vermont and was then dumped, tested, weighed and cooled. The milk was then placed in cans and shipped into Massachusetts within forty-eight hours after its receipt by the Company. The Court said: "It is settled law that the purchase of a commodity in one state for the purpose of transporting it to another state is a transaction in interstate commerce within the Commerce Clause of the Constitution and not subject to burdens imposed by state regulations. * * * The purchase is none the less a part of the interstate com-

merce because of the method of receiving deliveries adopted by the defendants. The intermediate deliveries by the pur- [fol. 33] chasers to the defendant's receiving station did not end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination."

Under the authority of these cases we are of the opinion that the entire activity of the defendant as set forth in the Case Stated constituted interstate commerce and that for the purpose of regulation, the purchase of the milk cannot be separated from its transportation.

The plaintiff insists, however, that even if the defendant is engaged in interstate commerce it is required to secure a license from the plaintiff and to post a bond with the Commonwealth as collateral security for the payment of milk purchased and to pay purchasers certain minimum prices under the regulations and control of the plaintiff, on the theory that such regulation by the state is a valid exercise of its police power, and that such power rises above the right of the Federal Government to control interstate commerce, or, at least, exists until the Federal Government exercises some control over the subject matter.

The case of *Townsend v. Yeomans*, reported in the *Advance Opinions of the Lawyers Edition of the United States Supreme Court Reports*, Vol. 81, No. 16, page 840, is strongly relied upon by the plaintiff as authority for the proposition that where a matter admits of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act. This, however, does not permit a state to regulate or to place a burden upon interstate commerce, and the Court clearly indicated that the state [fol. 34] statute there under consideration did not impose such burden. The Court said (page 847): "We find no ground for concluding that the state requirements lay any actual burden upon interstate or foreign commerce. The Georgia Act does not attempt to fix the prices at auction sales or to regulate the activities of the purchasers. The fixing of reasonable maximum charges for the services of the warehousemen in aid of the tobacco growers does not militate against any interest of those who buy. They pay the bid price, as accepted, and the warehousemen pays the seller, deducting from the purchase price the warehouse charges."

This quotation clearly differentiates *Townsend v. Yeomans* from the present case. Here, if the defendant is subject to the control of the plaintiff, it would be required to pay the milk producers not the agreed price, but the price fixed by the plaintiff. It would also be required to post a bond to secure payment to the producers of the prices fixed by the plaintiff and would be required to pay license fees. The cost of the milk to it would be increased by the premium on the bond, by the license fee, and by the increase in price ordered by the plaintiff. The effect of such regulation and such price fixing would be exactly equivalent to the imposition of a tax on the export of milk.

The regulation here sought to be imposed is very similar to the regulation sought to be imposed in *Lemke v. Farmers' Grain Co.*, 258 U. S. 50; 66 L. Ed. 458 (1921) *supra*. There, after outlining the control to be exercised under the State Act the Court said: "That is, the state officer may fix and determine the price to be paid for grain which is bought, [fol. 35] shipped and sold in interstate commerce. That this is a regulation of interstate commerce is obvious from its mere statement."

Again, in *Shafer v. Farmers Grain Co.*, 268 U. S. 189; 69 L. Ed. 909 (1924) *supra*, the state statute required every buyer to give to the state a bond securing payment for all wheat purchased on credit, to keep records of his transactions, and to furnish such data to the state authorities. It also required a state supervisor to investigate and supervise the marketing of grain for the purpose of preventing various things which were deemed unjust and fraudulent, and authorized him to make rules and regulations to carry out the provisions of the Act. The Court said (page 915): "We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause."

The plaintiff seeks to distinguish these North Dakota grain cases on the ground that in North Dakota 90% of the wheat produced was sold in other states whereas only 10% of the milk produced in Pennsylvania is so sold. Undoubtedly, the laws of Pennsylvania relating to milk control were not enacted for the primary purpose of regulating

interstate commerce, but if they have that effect they are invalid as applied to such interstate commerce regardless of the proportion which such commerce bears to the total commerce of the state. Nor do we agree that these cases have been overruled by *Townsend v. Yeomans*, supra, as the [fol. 36] Court in that case carefully distinguishes the North Dakota Grain cases.

The plaintiff further calls our attention to Section 808 of Act No. 105 approved April 28, 1937, wherein it is declared to be the legislative intent that the prices prescribed by the Commission for milk produced in this Commonwealth and sold in this Commonwealth for shipment into and sale in another state shall not be destructive of the price structure of producers in such other state. The effect of price fixing upon the price structure of producers in other states, however, is not the criterion. The test is whether the regulation and the price fixing amounts to a regulation of interstate commerce and places a burden upon it. If it does, it is beyond the power of the state and cannot be sustained. The effect of a state statute fixing prices as applied to a sale in interstate commerce is tersely stated by Justice Cardozo in *Highland Farms Dairy, Inc. v. Agnew*, 81 L. Ed. 514; 518 (1936) as follows: "Highland in Washington may sell to High in Virginia and High may buy from Highland, at any price they please."

However desirable it may be for the Pennsylvania Milk Control Board to stabilize the dairy industry, and however necessary it may be for it to regulate the transactions of the defendant and other buyers of milk similarly engaged to effect this purpose, we conclude that the effect of the present statute would be to regulate and to place a burden upon interstate commerce.

Under the terms of the case stated it is therefore necessary that judgment be entered in this case in favor of the defendant and that the plaintiff's bill be dismissed at the cost of the plaintiff.

[fol. 37]

CONCLUSIONS OF LAW

1. All of the transactions of the defendant including the purchase of milk from the Pennsylvania farmer-producers, within the Commonwealth of Pennsylvania, constitute interstate commerce.

2. The regulations sought to be imposed upon the defendant by the plaintiff, including the taking out of a license as

provided by the Act of April 28, 1937, posting a bond conditioned for the payment of all amounts due to farmers under the Act and under orders of the Milk Control Commission, and to pay such milk prices to the farmers as is required by the Commission would constitute a regulation of and a burden upon interstate commerce.

3. The defendant, in its operations as described in the Case Stated, is not subject to the jurisdiction or control of the Milk Control Commission of the Commonwealth of Pennsylvania in the matters complained of by the plaintiff.

DECREE

And Now, August 23, 1937, upon consideration of the foregoing case, it is ordered, adjudged and decreed that judgment therein shall be entered in favor of the defendant as stipulated in the Case Stated, and that the plaintiff's bill of complaint be and the same is hereby dismissed at the cost of the plaintiff.

It is further ordered that the Prothonotary shall enter the above decree nisi and give notice of the entry thereof to the parties or their counsel of record, and if no exceptions [fol. 38] be filed thereto by either party within ten days after such notice is given, the decree entered nisi shall be entered as an absolute decree.

By the court.

(S.) W. C. Sheely, P. J., Judicial District, 51st, Specially Presiding.

IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

STIPULATION AS TO TIME FOR FILING EXCEPTIONS

And Now, August 30 1937, it is stipulated and agreed by and between Thomas Caldwell, attorney for the defendant, and Gilbert S. Parnell, Special Deputy Attorney General, and Charles J. Ware, Assistant Deputy Attorney General, attorneys for the plaintiff that, due to the absence from the Commonwealth of Pennsylvania until September 10, 1937 of Harry Polikoff, Deputy Attorney General in charge of this case for the plaintiff, the date within which to file exceptions, if any, to the adjudication and decree of the court shall be extended to September 20, 1937, subject to the approval of the court and the decree nisi entered August 23,

1937 shall not become absolute unless the plaintiff fails to file exceptions on or before September 20, 1937.

Thomas D. Caldwell, Attorney for Defendant; Gilbert S. Parnell, Special Deputy Attorney General; Charles J. Ware, Assistant Deputy Attorney General, Attorneys for the Plaintiff.

[fol. 39] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

ORDER EXTENDING TIME

And Now, August 31, 1937 the above stipulation is approved and time within which to file exceptions is extended to September 20, 1937.

W. C. Sheely.

IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

PLAINTIFF'S EXCEPTIONS TO ADJUDICATION AND DECREE

And Now, to wit, this twentieth day of September, 1937, the plaintiff, by its counsel Harry Polikoff, Deputy Attorney General does file the following exceptions to the conclusions of law, adjudication and decree in the above captioned case:

1. Plaintiff excepts to the learned chancellor's first conclusion of law, which reads:

"1. All of the transactions of the defendant including the purchase of milk from the Pennsylvania farmer-producers, within the Commonwealth of Pennsylvania, constitute interstate commerce."

2. Plaintiff excepts to the learned chancellor's second conclusion of law, which reads:

"2. The regulations sought to be imposed upon the defendant by the plaintiff, including the taking out of a license as provided by the Act of April 26, 1937, posting a bond conditioned for the payment of all amounts due to farmers under the Act and under orders of the Milk Control Commission, and to pay such milk prices to the farmers as is [fol. 40] required by the Commission would constitute a regulation of and a burden upon interstate commerce."

3. Plaintiff excepts to the learned chancellor's third conclusion of law, which reads:

"3. The defendant, in its operations as described in the Case Stated, is not subject to the jurisdiction or control of the Milk Control Commission of the Commonwealth of Pennsylvania in the matters complained of by the plaintiff."

4. Plaintiff excepts to the learned chancellor's decree nisi, which is as follows:

"And Now, August 23, 1937, upon consideration of the foregoing case, it is ordered, adjudged and decreed that judgment therein shall be entered in favor of the defendant as stipulated in the Case Stated and that the plaintiff's bill of complaint be and the same is hereby dismissed at the cost of the plaintiff."

Respectfully submitted, Harry Polikoff, Deputy Attorney General.

[fol. 41] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

OPINION

This matter is before us on exceptions filed by the plaintiff to the Conclusions of Law and Decree Nisi filed by the Chancellor in the above matter. The case was before the Chancellor on a Case Stated which submitted the following questions:

1. Is the defendant wholly engaged in interstate commerce?

2. Is the defendant under the circumstances above set forth required to take out a license as a milk dealer within the provisions of the act known as the Milk Control Board Law, approved April 30, 1935, P. L. 96 (reenacted by the Act of April 28, 1937, No. 105) and generally comply with the provisions of said Act or any part thereof including the orders issued thereunder?

The Chancellor determined that all of the transactions of the defendant within the Commonwealth of Pennsylvania constituted interstate commerce, and that the regulation sought to be imposed by the plaintiff, including the taking

out of a license, posting a bond conditioned for the payment of all amounts due to farmers under the Act and under orders of the Milk Control Commission, and to pay such minimum prices to the farmers as is required by the Commission would constitute a regulation of and a burden upon interstate commerce, and that the defendant, in its operations as described in the Case Stated, is not subject to the jurisdiction or control of the Milk Control Commission of the Commonwealth of Pennsylvania in the matters complained of by the plaintiff. It is to these Conclusions of Law that the plaintiff now excepts.

The facts agreed upon in the Case Stated are that the defendant operates a milk-receiving plant within the Commonwealth of Pennsylvania at which it buys milk brought to the plant by the farmer-producers. The milk is weighed and tested by the defendant and is then dumped into receiving tanks where it is cooled for the sole purpose of preventing the growth of bacteria during shipment. Within a period of twenty-four hours after the milk is received at the plant it is shipped to New York City in tank trucks operated for the defendant, for resale in that city.

Before the Chancellor the plaintiff based its right to require the defendant to submit to its jurisdiction upon the theory that the contract between the Pennsylvania farmers and the defendant consisted of an offer and an acceptance, which contract was completely performed by both parties within the Commonwealth of Pennsylvania and was entirely an intrastate transaction. It further contended that even if the defendant were engaged wholly in interstate commerce the regulation sought to be imposed by the state was a valid exercise of its police power, and that such power rises above the right of the federal government to control interstate commerce or, at least, exists until the federal government exercises some control over the subject matter. The plaintiff does not now press the first theory but insists that the regulation sought to be imposed is a valid exercise of the police power, and that such power is superior to the power of the federal government over interstate commerce and that the regulation sought to be imposed by the plaintiff [fol. 43] was threefold: (1) to require the defendant to be licensed; (2) to require the defendant to post a bond; (3) and to require the defendant to pay certain prescribed prices. The plaintiff contends that the Chancellor should

at least have sustained the Commonwealth upon the subjects of licensing and bonding.

The plaintiff contends that the Chancellor erred in relying upon the *Farmers Grain Company* cases, 258 U. S. 50 (1921) and 268 U. S. 189 (1924), and that these cases were virtually overruled by *Townsend v. Yeomans*, 81 L. Ed. 840 (May 24, 1937), which reaffirmed *Munn v. Illinois*, 94 U. S. 113 (1876), and other like cases cited by the plaintiff.

We have carefully re-examined the opinions in *Townsend v. Yeomans*, *Munn v. Illinois*, and the other cases cited by the plaintiff, and cannot agree that these cases govern the present situation. "In *Munn v. Illinois*, 94 U. S. 113, the question was whether, as respects an elevator devoted to storing grain for hire, the state could regulate the storage charge where part of the grain reached the elevator, or was destined to leave it, through the channels of interstate commerce. The court held such a regulation admissible because of the public character of the elevator, and because interstate commerce was affected only incidentally and remotely. No restriction on buying or shipping was involved. In *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, the court had before it a state statute, much of which had been pronounced unconstitutional by the state court. In sustaining a provision which remained, the court said, p. 470: 'The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state, or the shipment out of the state of such grain as it purchased.' Plainly the case is not in point here. In *Merchant Exch. v. Missouri*, 248 U. S. 365, the statute involved required that public weighers appointed for the purpose should do the weighing and issue weight certificates at elevators used for storing or transferring grain for hire, and prohibited any other person from issuing weight certificates at an elevator where a public weigher was stationed. Objection was made to the prohibition on the ground that, as applied to grain received from or shipped to points without the state, it burdened interstate commerce. Of course the objection was overruled, the statute being an admissible regulation of the business of conducting an elevator for hire, like the statute considered in *Munn v. Illinois*." *Shafer v. Farmers Grain Co.*, 268 U. S. 189 (1924).

In *Budd v. New York*, 143 U. S. 517 (1891), also relied upon by the plaintiff, the court considered a statute fixing the maximum charge for elevating, receiving, weighing and

discharging grain at elevators and warehouses almost exactly as in *Munn v. Illinois*. The statute had no relation whatever to the purchase or sale of grain. In *Brass v. North Dakota*, 153 U. S. 391 (1893) the statute under consideration regulated grain warehouses and the weighing and handling of grain, requiring public warehousemen to give bond to the state, fixing rates of storage, and requiring warehousemen to carry insurance. Here, too, there was no restriction or regulation or buying or selling, and the effect on interstate commerce was only incidental and remote.

[fol. 45] In *Townsend v. Yeomans*, 81 L. Ed. (1937), the Supreme Court was considering an act of the Legislature of Georgia prescribing the maximum charges which could be made by warehousemen for the handling of tobacco. Under the method of handling tobacco in Georgia, the tobacco is brought to the warehouses by the seller and there sold to buyers who immediately ship the tobacco to other states. Payment for the tobacco is made to the warehouseman who deducts his charges and remits the balance to the sellers. The act had no relation whatever to the buying and selling of tobacco and was distinguished by the Supreme Court from the *Farmers Grain Company* cases by showing that the "Georgia Act lays no constraint upon purchases in interstate commerce, does not attempt to fix the prices or conditions of purchases, or the profit of the purchasers. It simply seeks to protect the tobacco growers from unreasonable charges of the warehousemen for their services to the growers in handling and selling the tobacco for their account. Whatever relation these transactions had to interstate and foreign commerce, the effect is merely incidental and imposes no direct burden upon that commerce."

The distinction between *Munn v. Illinois*, *Townsend v. Yeomans*, and the other cases relied upon by the plaintiff, on the one hand, and the *Farmers Grain Co.* cases and the present case, on the other, lies in the fact that in the former the regulation was confined to warehouses, elevators, or other agencies through which interstate commerce might flow, but whose activities were entirely intrastate. In the latter cases the statutes sought to regulate the act of purchasing articles which were to be shipped in interstate commerce, and to prohibit such purchases unless made upon terms prescribed by the statute or by administrative agencies. It is not the milk-receiving plant operated by the

defendant that the plaintiff seeks to regulate, but the business conducted by the defendant of buying and shipping milk. The very purpose of the Milk Control Law of Pennsylvania as stated in Section 101 of the Act is "regulating and controlling the milk industry in this Commonwealth, for the protection of the public health and welfare and for the prevention of fraud."

There is a vast difference in the effect upon interstate commerce of a statute regulating a warehouseman or grain elevator through whose hands interstate commerce passes, and a statute regulating and controlling the purchase of a commodity and the transportation thereof in interstate commerce. *Townsend v. Yeoman's* does not overrule, directly or indirectly, the *Farmers Grain Company* cases, but is distinguished from those cases in exactly the same manner as is *Munn v. Illinois*. In *Shafer v. Farmers Grain Co.*, 268 U. S. 189 (1924), the North Dakota statute under consideration provided, among other things, that every buyer operating a grain elevator must obtain a yearly license, the fee for which was to be adjusted to the capacity of the elevator, and required those operators who do not pay cash in advance to file with the supervisor a sufficient bond to secure payment for all wheat bought on credit, and to keep records of all purchases. In *Lemke v. Farmers Grain Company*, 258 U. S. 50 (1921), the Act provided that purchases of grain could be made only by those who held licenses from the state, pay state charges for the same, and act under a system of grading, etc. defined in the Act, and that grain could only be purchased subject to the power of the inspector to determine the margin of profit which the buyer should realize upon his purchase.

It was contended in the *Farmers Grain Company* cases, as it is contended here, that the regulations could stand upon the principle which permits the state to make local laws under its police power in the interest of the welfare of its people, which are valid although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the states. It was held that this principle has no application where the state passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it, and that a state statute which, by its necessary operation, directly

interferes with or burdens such commerce, is a prohibited regulation and invalid regardless of the purpose with which it was enacted.

Undoubtedly, the state in the exercise of its police power may enact statutes the effect of which upon interstate commerce is indirect and incidental, and until Congress, under the commerce power, adopts inconsistent legislation, that of the state remains effective. *Hartford Accident and Indemnity Company v. Illinois*, 298 U. S. 155 (1936). But when the attempted exercise of the police power amounts to a direct regulation of interstate commerce, and directly places a burden thereon, it is invalid. The Pennsylvania Legislature in adopting the Milk Control Law of 1937 recognized this principle. In Section 1201 it provided that no provision [fol. 48] of the Act shall apply, or be considered to apply to foreign or interstate commerce, except in so far as the same may be effective in accordance with the constitution of the United States and the laws of Congress enacted pursuant thereto.

On its facts the present case cannot be distinguished from the *Farmers Grain Company* cases, 258 U. S. 50 (1921) and 268 U. S. 189 (1924). On the authority of those cases the regulation sought to be imposed upon the defendant by the plaintiff is beyond the power of the state and cannot be endorsed. The exceptions to the Chancellor's conclusions of law must be dismissed and the decree nisi entered as a final decree.

And Now, December 7, 1937, the plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree.

By the Court in Banc.

(Signed) W. C. Sheely, P. J. Fifty-first Judicial District, Specially Presiding.

And Now, December 7, 1937, an exception to the foregoing order and to the final decree is noted for the plaintiff.

By the Court.

(Signed) W. C. Sheely, P. J.

IN SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT, MAY
TERM, 1938

No. 22

MILK CONTROL BOARD OF THE COMMONWEALTH OF PENNSYLVANIA, Appellant,

v.

EISENBERG FARM PRODUCTS, A Pennsylvania Corporation

Appeal from decree of the Court of Common Pleas of
Dauphin County

OPINION OF THE COURT

KEPHART, C. J.:

Before passing on the questions presented to the court below as to whether the legislature may, through the Milk Control Law, prescribe certain regulations such as licensing, bonding and minimum prices for producers or dealers in the milk industry, effective where the product is purchased and destined for interstate commerce, we must first decide whether these provisions are valid police regulations under our Constitution. If they are not, then the questions under the commerce clause of the Federal Constitution need not be considered.

We have held in *Colteryahn Sanitary Dairy v. Milk Control Commission*, and *Keystone Dairy Co. v. Milk Control Commission*, appeals 6, May Term 1938, and 38, May Term, 1938, that the Act of January 2, 1934, P. L. 174, and the Acts of April 30, 1935, P. L. 96, and April 28, 1937, P. L. 417 amending and reenacting its provisions, are constitutional. See *Rohrer v. Milk Control Board*, 322 Pa. 257, where it was held that licensing and price-fixing had a direct and substantial relation to sanitation, public health and public welfare. While bonding was not specifically mentioned, it was listed and necessarily included as it was one of the questions in the case. It was conceded at the argument in the present case that the Court could take judicial notice of the fact that licensing and bonding do bear a necessary relation to the preservation and continuation of an adequate [fol. 50] supply of pure milk, a necessary article of food in

the State, and are in the interest of sanitation and public health.

These provisions are also a protection against the danger of fraud to the producer and public so well described by President Judge Keller in *Rohrer v. Milk Control Board*, supra. Such regulations, tending to prevent strikes and the dumping of the product on the market, harmful to the public; to provide a fair price and secure its payment, are necessary to prevent cutting off the supply to the public and to assure its purity and necessary quality. With this end in view the bonds are required as securities for the extension of credit by producers, to prevent fraud and imposition on them, and to eliminate irresponsible and dishonest dealers who are a constant menace to the consuming public. Bonding is therefore related to this legitimate purpose, which is a proper exercise of the police power. Moreover, this Court has held that the legislature may constitutionally require bonds in other industries affected with a public interest to secure payment to subcontractors, mechanics, laborers and materialmen, because of the very elements of fraud prevention, and the inability, otherwise, of those to be benefited to procure payment or credit. See the opinion of Justice Simpson, in *Commonwealth v. Great American Indemnity Co.*, 312 Pa. 183, at 196.

The court below has adequately covered in its opinion all questions involved, and has passed on the Federal issues under the decisions of the Supreme Court of the United States. The portion of the opinion relating thereto is printed in the Reporter's Note. While we have felt, and still feel, that state laws regulating transactions incidental to interstate commerce, but designed to protect the health, safety, or welfare of the public, are proper state regulation where the transaction which is the origin and beginning of the commerce, is peculiarly within the state's domain, the Supreme Court of the United States in the case of *DiSanto v. Pennsylvania*, 273 U. S. 34, and other cases has held that such regulations are a burden on interstate commerce and [fol. 51] that the states are forbidden to legislate thereon even though the Federal Government has taken no steps to protect the public from the danger of fraud. The Commonwealth earnestly argues that the effect of these decisions should be changed. We are controlled by them on matters affecting interstate commerce.

Decree affirmed at appellant's cost.

[Title omitted]

PETITION FOR REHEARING AND REARGUMENT

To the Honorables, the Justices of Said Court:

The petition of the Milk Control Board of the Commonwealth of Pennsylvania (now Milk Control Commission), appellant in the above case, by Guy K. Bard, Attorney General, Harry Polikoff, Deputy Attorney General, and Charles J. Ware, Assistant Deputy Attorney General, respectfully prays your Honorable Court to grant a rehearing and reargument, for the following reasons:

I

Questionable Authority of *DiSanto v. Pennsylvania*

Your Honorable Court, in the opinion in the instant case, regards the position of the appellant with favor in endeavoring to sustain a state law regulating transactions incidental to interstate commerce, but designed to protect the health, safety and welfare of the public, where the transaction which is the origin and beginning of the commerce, is peculiarly within the state domain. However, the opinion further states that your Honorable Court is controlled on [fol. 53] matters affecting interstate commerce by the decision of the United States Supreme Court in *Di Santo v. Pennsylvania*, 273 U. S. 34 (1927), which holds that such regulations are a burden on interstate commerce, and that the states are forbidden to legislate thereon even though the Federal Government has taken no steps to protect the public from the danger of fraud.

The appellant respectfully submits that the majority opinion of the United States Supreme Court in this case was founded on misapprehension and error in the application of the facts to the legal principles involved, and that today *Di Santo v. Pennsylvania* stands overruled, if not in terms at least in effect, by subsequent decisions of the same court.

Mr. Justice Butler, speaking for the court, states that the case is controlled by *Texas Transport Co. v. New Orleans*, 264 U. S. 150, and *McCall v. California*, 136 U. S. 104. Mr. Justice Brandeis, dissenting, makes this pertinent observation regarding the *McCall* case (page 41):

“* * * Disregard of the McCall case would not involve unsettlement of any constitutional principle or of any rule of law, properly so called. It would involve merely refusal to repeat an error once made in applying a rule of law—an error which has already proved misleading as a precedent. While the question whether a particular statute has the effect of burdening interstate or foreign commerce directly presents always a question of law, the determination upon which the validity or invalidity of the statute depends, is largely or wholly one of fact. * * *

“* * * The human experience embodied in the doctrine of stare decisis teaches us, also, that often it is better to follow a precedent, although it does not involve the declaration of a rule. This is usually true so far as concerns a [fol. 54] particular statute whether the error was made in construing it or in passing upon its validity. But the doctrine of stare decisis does not command that we err again when we have occasion to pass upon a different statute. In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken. This course seems to me imperative when, as here, the decision to be made involves the delicate adjustment of conflicting claims of the Federal Government and the States to regulate commerce. The many cases on the Commerce Clause in which this Court has overruled or explained away its earlier decisions show that the wisdom of this course has been heretofore recognized. In the case at bar, also, the logic of words should yield to the logic of realities.”

Thus most serious questions were raised at the time the Di Santo case was first decided in the dissenting opinions of Justices Brandeis and Stone, in the first of which Justice Holmes concurred.

In declaring the Pennsylvania statute unconstitutional as a direct burden on foreign commerce, the majority opinion of the court summarily disposed of the entire question of state regulation with this statement of the law (page 37):

“* * * A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed. * * * Such legis-

lation cannot be sustained as an exertion of the police power of the State to prevent possible fraud. * * * The Congress has complete and paramount authority to regulate foreign commerce and, by appropriate measures, to protect the public against the frauds of those who sell these tickets and orders. The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers and operated by their servants and employees. The license fee and other things imposed by the Act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce. * * *"

[fol. 55] Your petitioner respectfully urges that in the light of more recent pronouncements of the United States Supreme Court this statement cannot be fairly said to reflect the present status of the law in this regard.

In *South Carolina vs. Barnwell Bros.*, 82 L. ed. 469, decided in February, 1938, the court held constitutional a South Carolina statute which prohibited the use of that state's highways to motor trucks whose width exceeded 90 inches, and whose weight exceeded 20,000 pounds. The Interstate Commerce Commission was one of the original complaining parties, and the trial court made findings, not assailed on appeal, that a large amount of motor truck traffic passing inter-state in the southeastern part of the United States, which would normally pass over the highways of South Carolina, would be barred from the state by the restrictions, if enforced. It further found that compliance with the weight and width limitations, would seriously impede motor truck traffic passing to and through the state and increase its costs. Furthermore, the state road system constituted a connected system of highways which were improved with the aid of Federal money grants, as part of a National system of highways. In holding that these regulations were not an unreasonable burden on interstate commerce, the court at page 474, per Mr. Justice Stone, held:

"But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to make measures to insure the safety

and conservation of their highways which may be applied to like traffic moving intrastate. • • • The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate [fol. 56] and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse."

The earnest attention of your Honorable Court is directed to the following language from the same opinion for comparison with the law as set forth in the Di Santo case (pages 476, 477):

"In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.

"Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. *Sproles v. Binford*, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581, *supra*; *Stephenson v. Binford*, 287 U. S. 251, 272, 77 L. ed. 288, 298, 53 S. Ct. 181, 87 A. L. R. 721."

"• • • This is equally the case when the legislative power is one which may legitimately place an incidental

burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for legislative judgment. * * *"

[fol. 57] Thus, under this most recent statement of the court, it is now held that the commerce clause operates of its own force to curtail state power in some measure, but it does not forestall all state action affecting interstate commerce, and the test is whether the state legislation of local concern is in point of fact aimed at interstate commerce, or by necessary operation is a means of gaining a local benefit by throwing burdens on those without the state. Further, in the absence of national legislation, especially covering the subject, the state may rightly prescribe uniform regulations adapted to promote safety, applicable alike to interstate and intra-state commerce.

The regulations prescribed by this Commonwealth in respect to milk control, conform to those requirements in every instance. The licensing and bonding requirements, as applied to dealers, cannot distinguish between milk moving intra-state or interstate in Pennsylvania; nor are there Federal regulations in existence which might overlap to cover this type of commerce. There can be no distinction between the promotion of safety, as the term is used by Mr. Justice Stone, and proper concern for the preservation of health and the suppression of fraud—objects of milk control legislation favorably passed upon in this respect by the Supreme Court of the United States in *Nebbia v. New York*, 291 U. S. 502, and your Honorable Court in *Rohrer v. Milk Control Board*, 322 Pa. 257 (1936), recently reiterated by Mr. Chief Justice Kephart in *Colteryahn Sanitary Dairy v. Milk Control Commission*, and the opinion in the instant case (decided July 1, 1938).

In concluding this phase of the petition for rehearing your petitioner respectfully submits the decision in the [fol. 58] *Barnwell* case, *supra*, renders the *Di Santo* case obsolete, incorporates the principles of law set forth in the dissenting opinion of Mr. Justice Brandeis, and re-establishes as law the opinion of this Honorable Court written by his Honor, Mr. Chief Justice Kephart.

II

North Dakota Farmers Grain Company Cases Overruled by
Townsend vs. Yeomans

The appellant respectfully submits that the trial court in the original opinion, through misapprehension and error, predicated its decision on the cases of *Lemke v. Farmers Grain Co.*, 258 U. S. 50, and *Shafer v. Farmers Grain Co.*, 268 U. S. 189, the holdings in which cases have been impliedly overruled by *Townsend vs. Yeomans*, 81 L. ed. 840. The original doctrine of *Munn v. Illinois*, 94 U. S. 113, was thus re-established by the decision in the *Townsend* case, the opinion referring at length to the *Munn* case, and other similar cases, squarely following them.

The Illinois statute construed in *Munn v. Illinois*, *supra*, required a license, a bond and maximum charges for the storage and handling of grain. The Georgia statute upheld by the court in *Townsend vs. Yeomans* (*supra*) fixed maximum charges for handling and selling leaf tobacco. In both instances a large portion of the product, i. e. grain and tobacco, moved into the channels of interstate commerce.

The similarity between the provisions of these statutes and the salient features of the Milk Control Law of this Commonwealth will be readily apparent to your Honorable Court, and we submit that the trial court misapprehended the present position of the United States Supreme Court by [fol. 59] basing a conclusion primarily on the *Farmers Grain* cases (*supra*).

III

Decision in *Baldwin v. Seelig* Not Applicable in
Determination of the Instant Case

The appellee in its brief strongly relies on the decision in the case of *Baldwin v. Seelig*, 294 U. S. 511 (1935), to support its contention that the Commonwealth's milk regulations are a direct interference with interstate commerce.

The appellant submits that on its facts the *Baldwin* case has no application to the case at bar.

In that case the question raised was whether the State of New York could fix the price to be paid by New York milk dealers to producers in Vermont, for milk produced and purchased in Vermont and sold in New York.

The Supreme Court of the United States very properly ruled that New York could not regulate the price paid for milk purchased in Vermont. As applied to the facts in the present case this simply means that New York cannot impose upon the appellee, purchasing milk in Pennsylvania, the regulations which Pennsylvania is seeking to enforce.

The appellant respectfully urges that the statements in the Baldwin opinion in respect to burdens on, and interferences with commerce, must be read in the light of the unusual and drastic regulations which New York sought therein to impose.

Therefore, in consideration of the foregoing matters, the Milk Control Commission prays that a reargument be [fol. 60] granted in the above captioned case in order that the grave matters of public concern and the issues of law above specified may be reconsidered by your Honorable Court.

And it will ever pray, etc.

(Signed) Guy K. Bard, Attorney General. (Signed)
Harry Polikoff, Deputy Attorney General. (Signed)
Charles J. Ware, Assistant Deputy Attorney
General.

Dated Harrisburg, Pa., July 13, 1938.

In accordance with the rules of court, there are attached hereto a copy of the opinion written by the Honorable Mr. Chief Justice John W. Kephart, of the Supreme Court of Pennsylvania; and the adjudication and final decree written by the Honorable W. C. Sheely, specially presiding in the Court of Common Pleas of Dauphin County. Copies of all the briefs used in the argument by all parties accompany this petition.

Respectfully submitted, (Signed) Charles J. Ware,
Assistant Deputy Attorney General.

[fol. 61] IN SUPREME COURT OF PENNSYLVANIA

ORDER DENYING REARGUMENT—July 25, 1938

Reargument refused.

Per Curiam.

[fol. 62] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION TO HOLD RECORD PENDING APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

To the Honorable the Justices of the said Court:

Your petitioner respectfully represents:

1. That your petitioner is the Milk Control Commission of the Commonwealth of Pennsylvania.

2. That the above appeal, terminated adversely to petitioner by your Honorable Court, involves a grave question of public concern, namely, whether or not the licensing and bonding provisions of the Milk Control Law are in conflict with the commerce clause of the United States Constitution, as being a burden on interstate commerce.

3. That your petitioner previously filed with your Honorable Court a petition for reargument in said cause, said petition being refused by your Honorable Court on July 25, 1938.

4. That your petitioner desires, because of the aforesaid grave question of public concern involved in this cause, to have the decision of your Honorable Court reviewed by the Supreme Court of the United States, and in pursuance thereof will take immediate action to present the matter to said Court.

5. Your petitioner desires the entire record in said case to be retained by the Prothonotary of the Middle District of Pennsylvania until this action can be completed.

[fol. 63] Wherefore, your petitioner prays that your Honorable Court grant an order on said Prothonotary, directing him to hold said record pending the disposition of the application of your petitioner in this appeal.

Guy K. Bard, Attorney General. Harry Polikoff,
Deputy Attorney General. (Signed) Charles J.
Ware, Assistant Deputy Attorney General.

[fol. 64] IN SUPREME COURT OF PENNSYLVANIA

ORDER HOLDING RECORD

And Now, this 29th day of July, 1938, upon consideration of the foregoing petition, it is hereby ordered that the record in the above case be held for thirty days unless before that time an appeal be allowed or refused in the application to be instituted in this matter.

Per Curiam.

[fol. 65] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION TO EXTEND TIME FOR HOLDING RECORD PENDING
APPEAL TO SUPREME COURT OF THE UNITED STATES

To the Honorable the Justices of the said Court:

The petitioner, appellant herein, through its counsel Guy K. Bard, Attorney General, Harry Polikoff, Deputy Attorney General, and Charles J. Ware, Assistant Deputy Attorney General, respectfully represents:

1. That on July 29, 1938, pursuant to petition filed in the above named cause, your Honorable Court directed the Prothonotary to hold the record in the above captioned case for a period of thirty days pending an appeal to the Supreme Court of the United States.

2. That in accordance with the rules of the Supreme Court of the United States the appellate procedure required herein is by petition to the Supreme Court of the United States for a Writ of Certiorari.

3. That such procedure requires the printing of certain records; preparation and printing of a petition for a Writ of Certiorari; preparation and printing of a brief in support of such petition, and the issuance of process by the Supreme Court of the United States requiring your Honorable Court to certify the record hereof to said court for review thereon.

4. That it is impossible to complete the aforesaid procedure within the period of thirty days as hitherto allowed [fol. 66] in the order of your Honorable Court.

Wherefore, your petitioner prays that said order directing the Prothonotary to hold the record of the above captioned case for a period of thirty days be extended to provide for the holding of said record an additional sixty days.

Guy K. Bard, Attorney General. Harry Polikoff,
Deputy Attorney General. (Signed) Charles J.
Ware, Assistant Deputy Attorney General.

[fol. 67] IN SUPREME COURT OF PENNSYLVANIA

ORDER EXTENDING TIME FOR HOLDING RECORD

And Now this 1 day of Sept. 1938, upon consideration of the foregoing petition, it is hereby ordered that the record in the above case be held by the Prothonotary for an additional sixty days as prayed for.

Per Curiam.

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 21, 1938

The petition herein for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 426

MILK CONTROL BOARD OF THE COMMONWEALTH
OF PENNSYLVANIA,

Petitioner,

vs.

EISENBERG FARM PRODUCTS, A PENNSYLVANIA
CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA AND BRIEF
IN SUPPORT THEREOF.

GUY K. BARD,
Attorney General of Pennsylvania;

HARRY POLIKOFF,
Deputy Attorney General,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 426

**MILK CONTROL BOARD OF THE COMMONWEALTH
OF PENNSYLVANIA,**

vs.

Petitioner,

**EISENBERG FARM PRODUCTS, A PENNSYLVANIA
CORPORATION.**

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA.**

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The petitioner herein respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Pennsylvania under date of June 30, 1938, upon which order said court refused rehearing and reargument July 25, 1938.

Opinions Below.

The opinion of the Supreme Court of Pennsylvania is reported in 200 Atlantic 154; and also appears in the record of the present proceedings (R. 284). This opinion, entered June 30, 1938, affirms the decree entered by the Court of

Common Pleas of Dauphin County; the opinions of the latter court are unreported at present; they appear in the record of the present proceedings (R. 15, 26).

Jurisdiction.

The order of the court below, the Supreme Court of Pennsylvania, was entered June 30, 1938. A petition for reargument and rehearing filed in said court was denied July 25, 1938. By orders entered July 29 and September 1, 1938, the record of the court below is being held therein pending the outcome of the instant petition.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended; 28 U. S. C., Sec. 344 (b).

Question Presented.

May a State statute regulating the milk industry by requiring that all milk dealers obtain a license, file a bond for the protection of farmers, and pay to farmers minimum prices prescribed by an administrative agency (or any one of said requirements) be enforced against a milk dealer buying milk at its plant within the State from farmers located therein for shipment to another State?

Statute Involved.

The Milk Control Law of the Commonwealth of Pennsylvania, enacted April 28, 1937, P. L. 417 continues in full force and effect (Section 1203) all proceedings commenced under laws repealed thereby, which laws include the Milk Control Board Law, approved April 30, 1935, P. L. 96 (31 P. S. Sec. 684). The present proceedings were commenced under the Act of 1935; although there is some change in the wording of the later law the present case is not affected by such change of wording, and no question has ever been raised in this connection. Section 3 of the Act of 1935 defines a milk dealer as follows:

“‘Milk Dealer’ means any person, including any store, as hereinafter defined, who purchases or handles milk within the Commonwealth for sale, shipment, storage, processing or manufacture within or without the Commonwealth.”

Section 10-A provides as follows with respect to licensing:

“Except as herein otherwise specifically provided, a milk dealer, as defined in this act, shall not buy milk from producers or others within this Commonwealth for storage, manufacture, processing, distribution, or sale within or without this Commonwealth, or sell or distribute milk within this Commonwealth, unless such dealer be duly licensed as herein provided; * * *

Section 12-A provides as follows with respect to bonding:

“Except as otherwise specifically provided in this act, a license shall not be issued to a milk dealer purchasing milk from producers within this Commonwealth unless the milk dealer shall execute and file with the application a personal bond approved by the board. * * *

Section 18 provides as follows (*inter alia*) with respect to milk prices:

“The board, after making the examination or investigation provided by this section, shall, with the approval of the Governor, fix, by official order, the minimum prices to be paid by milk dealers to producers and others for milk: Provided, however, That the fixing of prices to be paid to producers for milk to be used solely in manufacturing shall be discretionary with the board. * * *

“It shall be unlawful for any milk dealer to sell any milk for which he has paid, or agreed to pay, in the Commonwealth of Pennsylvania, a price lower than that fixed by the board for milk of that class or grade, taking into consideration a proper allowance for the cost of the transportation of such milk.”

Statement of Facts.

The facts in the present case, as admitted by both parties, and as determined by the Chancellor below, are as follows:

The plaintiff is the Milk Control Board of the Commonwealth of Pennsylvania, to which the Milk Control Commission is the statutory successor. The defendant is a milk dealer, a Pennsylvania corporation, which leases and operates a milk receiving plant in Elizabethville, Dauphin County, Pennsylvania (R. 16). At this plant the defendant buys milk from approximately 175 farmers in the surrounding section of Pennsylvania, who bring their milk to the plant in their individual cans. At the plant this milk is weighed and tested by the defendant, then dumped into large receiving tanks, wherein the milk is accumulated and cooled for the purpose of shipment (R. 16). This requires retention of the milk for less than twenty-four hours; the milk is transferred from the cooling tanks to tank trucks and is shipped into New York City for resale in said city by these tank trucks operated for defendant, the journey of said trucks being continuous from Elizabethville, Pennsylvania, to New York (R. 16). The milk is not processed in any other manner, and the cooling involved does not change the milk or its constituent parts. All of the milk thus purchased by the defendant is shipped to and resold in New York; none is sold by the defendant in Pennsylvania (R. 16). The defendant has been doing business in this manner for a period of more than three years.

Approximately 4,500,000,000 pounds of milk were produced in Pennsylvania in 1934, of which approximately 470,000,000 were shipped out of the State (R. 17). The plaintiff Board, in applying the above statutory provisions to all milk dealers in Pennsylvania, also required the defendant to (1) obtain a license as a milk dealer; (2) post

a bond conditioned for the payment of milk purchased from producers; and (3) pay to farmers the minimum milk prices prescribed by the Board (R. 17). With these requirements the defendant refused to comply upon the ground that it was engaged in interstate commerce and therefore not subject to the statute involved. Therefore the plaintiff filed a bill of complaint to restrain the defendant from doing business as a milk dealer contrary to the above statutory provisions. The Chancellor entered a decree *nisi* in favor of the defendant and against the plaintiff upon August 23, 1937 (R. 24). Exceptions thereto were dismissed by the county court en banc December 7, 1937, and the bill dismissed (R. 31). This decision was affirmed by the Supreme Court of Pennsylvania June 30, 1938 (R. 33).

Basis of Decisions Below.

The Court of Common Pleas of Dauphin County dismissed the bill of complaint mainly upon authority of *Lemke v. Farmers Grain Co.*, 258 U. S. 50 (1921), and *Shafer v. Farmers Grain Co.*, 268 U. S. 189 (1924), entering a decree *nisi*. Exceptions to the decree *nisi* were then dismissed by the county court en banc, in a second opinion to the same effect, distinguishing *Townsend v. Yeomans*, 301 U. S. 447 (1936). A final decree was entered for the defendant.

The decree of the court of common pleas was affirmed by the Supreme Court of Pennsylvania. The opinion of that court, written by Mr. Chief Justice Kephart, first determined that the (1) licensing, (2) bonding and (3) minimum price provisions of the statute involved were constitutional as a valid exercise of the State police power. After reaching this conclusion that court held that it was "controlled" by the decision of this Court in *Di Santo v. Pennsylvania*, 273 U. S. 34 (1927), and similar cases, notwithstanding that "We have felt, and still feel, that State laws

regulating transactions incidental to interstate commerce, but designed to protect the health, safety, or welfare of the public, are proper State regulation where the transaction which is the origin and beginning of the commerce, is peculiarly within the State's domain".

Specification of Errors to be Urged.

1. The Supreme Court of Pennsylvania erred in holding that decisions of this Court compelled the conclusion that enforcement of the Milk Control Law of Pennsylvania against the defendant violated the interstate commerce clause of the Constitution of the United States.

2. The Supreme Court of Pennsylvania erred in sustaining the decree dismissing the bill of complaint brought against the defendant to restrain it from doing business in violation of the Milk Control Law of Pennsylvania, Act of April 30, 1935, P. L. 96.

Reasons for Granting the Petition.

1. The present case is on all fours with earlier decisions of this Court, a line of authorities extending from *Munn v. Illinois*, 94 U. S. 113 (1876), to *Townsend v. Yeomans*, 301 U. S. 447 (1936). The principle of these cases is that a statute enacted within the State police power and applied alike to intrastate and interstate commerce, in matters admitting of diversity of treatment according to local conditions, does not contravene the interstate commerce clause until it is superseded by valid Federal regulation.

2. The Supreme Court of Pennsylvania erred in the conclusion that the instant case is controlled by *Di Santo v. Pennsylvania*, 273 U. S. 34 (1927), and similar cases, because such cases are distinguishable.

3. If the Supreme Court of Pennsylvania correctly relied upon *Di Santo v. Pennsylvania*, 273 U. S. 34 (1927),

reconsideration thereof by this Court at this time is necessary and desirable from a legal, social and economic point of view.

4. If the decision of the court below is the law of the land, the stabilization of the milk industry of the United States by means of milk control legislation will be greatly hindered.

WHEREFORE your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Pennsylvania, requiring that court to certify the whole record and the case herein to this Court for its review and determination.

MILK CONTROL COMMISSION OF THE
COMMONWEALTH OF PENNSYLVANIA,
By HOWARD G. EISEMAN,
Chairman, Petitioner;
GUY K. BARD,
Attorney General,
Counsel for Petitioner;
HARRY POLIKOFF,
Deputy Attorney General,
Counsel for Petitioner.

STATE OF PENNSYLVANIA,
County of Dauphin, ss:

Guy K. Bard, being duly sworn according to law, deposes and says: I am counsel for the petitioner herein; I have read the within petition and know the contents thereof; all the allegations in the said petition are true to the best of my knowledge, information and belief.

GUY K. BARD,

Sworn and subscribed to before me this 29th day of September, 1938.

(Signed)

MISS LUCILLE A. STROUP,

[SEAL.]

Notary Public.

My Commission expires March 5, 1939.

Certificate of Counsel.

I hereby certify that the foregoing petition is, in my opinion, well founded and entitled to the favorable consideration of the Court; and that it is not filed for the purpose of delay.

GUY K. BARD,

Attorney General.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 426

**MILK CONTROL BOARD OF THE COMMONWEALTH
OF PENNSYLVANIA,**

vs.

Petitioner,

**EISENBERG FARM PRODUCTS, A PENNSYLVANIA
CORPORATION.**

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

Specifications of Error.

The Supreme Court of Pennsylvania erred in the following respects:

1. The Supreme Court of Pennsylvania erred in holding that decisions of this Court compelled the conclusion that enforcement of the Milk Control Law of Pennsylvania against the defendant violated the interstate commerce clause of the Constitution of the United States.
2. The Supreme Court of Pennsylvania erred in sustaining the decree dismissing the bill of complaint brought against the defendant to restrain it from doing business in

violation of the Milk Control Law of Pennsylvania, Act of April 30, 1935, P. L. 96.

ARGUMENT.

The petition filed herewith sets forth four reasons for granting the petition, which summarize the arguments herein advanced for granting the writ.

1. *Munn v. Illinois*, and the many decisions of this Court based thereon, control the instant case.

There can be no essential distinction between dealers or handlers of grain and of milk; the difference, if any, would seem to favor regulation of the perishable commodity, milk. The grain and produce cases, it is submitted, fully control the present case. *Munn v. Illinois*, 94 U. S. 113 (1876), and *Cargill v. Minnesota*, 180 U. S. 452 (1900), sustained licensing, bonding, and the charge of certain rates by grain handlers, notwithstanding that the statutes so requiring affected grain shipped in interstate commerce. Similarly see *Merchants Exchange v. Missouri*, 248 U. S. 365 (1918); *Budd v. New York*, 143 U. S. 517 (1891), and *Brass v. North Dakota*, 153 U. S. 391 (1893). These cases were cited and discussed at length in *Townsend v. Yeomans*, 301 U. S. 447 (1936), wherein this Court unanimously sustained a State statute prescribing maximum charges for the handling and selling of leaf tobacco, notwithstanding that such tobacco was shipped in interstate commerce.

(a) With respect to *licensing*, *Cargill v. Minnesota*, 180 U. S. 452 (1900), at 470, held as follows:

"It is also contended that the requirement of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the states. This view cannot be accepted. The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state or the shipment out of

the state of such grain as it purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in respect of business conducted at an established warehouse in the state between the defendant and the sellers of grain. We do not perceive that in so doing the state has intrenched upon the domain of Federal authority, or regulated or sought to regulate interstate commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license."

(b) With respect to *bonding* the cases of *Hartford Accident and Indemnity Co. v. Illinois*, 298 U. S. 155 (1936), and *Arnold v. Hanna*, 276 U. S. 591 (1928), are ample authority in support of the statutory provision now at issue. In the former interstate commerce was squarely involved.

(c) With respect to the requirement that *minimum rates for milk* be paid to producers by milk dealers, the case of *Munn v. Illinois*, 94 U. S. 113 (1876), at 134, held as follows:

"The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied."

Similarly, in *Townsend v. Yeomans*, 301 U. S. 447 (1936), this Court held as follows in sustaining a Georgia statute fixing maximum charges for handling and selling leaf tobacco:

"The main contention of appellants is that the State had no power to enact the regulation as it attempted to govern transactions in the course of interstate and foreign commerce. Appellants urge that practically all the tobacco grown in Georgia is shipped out of the State, . . .

.

"We are thus brought to the final contention of appellants that the state law, although not in conflict with any exertion of federal authority, must fall as being

repugnant to the existence of an exclusive federal power although unexercised. The contention ignores the principle that this ground of invalidity is to be found only with respect to such matters as demand a general system or uniformity of regulation; that in others matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act. * * *

* * * * *

“Whatever relation these transactions had to interstate and foreign commerce, the effect is merely incidental and imposes no direct burden upon that commerce. The State is entitled to afford its industry this measure of protection until its requirement is superseded by valid federal regulation. The judgment of the District Court is affirmed.”

The county court was misled by a statement in the latter opinion to the effect that the Georgia Act “does not attempt to fix the prices or conditions of purchases”; it is submitted that this statement was made by this Court merely by way of distinguishing that case from another (*Lemke v. Farmers Grain Co.*, 258 U. S. 50 (1921)), wherein a North Dakota statute arbitrarily and inadequately delegated to a State officer the power to fix prices and profit margins, without prescribing reasonable standards. Of course a statute of such type is not a valid exercise of the State police power, and therefore would constitute a direct interference with interstate commerce. However, in the case at bar the Supreme Court of Pennsylvania has already held the licensing, bonding and price-fixing provisions of the statute to be a valid exercise of the state police power (R. 264).

Both of the courts below gave too great weight to *Lemke v. Farmers Grain Co.*, 258 U. S. 50 (1921), and *Shafer v. Farmers Grain Co.*, 268 U. S. 189 (1924). These cases

appear to be quite a departure from the principles earlier announced by this Court in *Munn v. Illinois*, *supra*, and its successors above cited. However, the *Farmers Grain* cases are correctly distinguished in *Townsend v. Yeomans*, *supra*, upon the ground just described: in those cases the statute exceeded the State police power for the reason above given, and therefore could not be permitted to affect interstate commerce directly or indirectly; no doubt this Court was also influenced by the Federal legislation covering much of the same subject in the State of North Dakota.

The latest expression of this Court upon the subject appears in *South Carolina v. Barnwell Bros.*, 303 U. S. 177 (1938):

"In each of these cases [police] regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states."

In the present case it has never even been hinted that the Commonwealth has endeavored to discriminate against milk dealers handling milk in interstate commerce.

The opinion of the court below is unequivocal to the effect that the (1) licensing, (2) bonding, and (3) minimum price provisions of the Milk Control Law are within the police power of the Commonwealth; it necessarily follows that since the subject matter is obviously one requiring diversity of treatment according to local conditions, the State may act in a non-discriminatory manner with respect thereto until Congress sees fit to act.

2. *Di Santo v. Pennsylvania* and like cases, relied upon by the court below, are distinguishable from the instant case.

The Supreme Court of Pennsylvania held that the instant case was controlled by *Di Santo v. Pennsylvania*, 273 U. S.

34 (1927). However, this case merely involved the validity of a statute requiring licenses to sell steamship tickets to or from foreign countries. This necessarily involved regulation of foreign commerce and foreign commerce only, the type of discriminatory legislation condemned by this Court as recently as *South Carolina v. Barnwell Bros.*, *supra*. The majority opinion in the *Di Santo* case held that it was controlled by *Texas Transport & Terminal Co. v. New Orleans*, 264 U. S. 150 (1924), and *McCall v. California*, 136 U. S. 104 (1889), yet both of the latter cases were tax cases, wherein appears not the slightest discussion of State police power (and both cases were decided by a divided court).

In the case at bar the legislation constitutes no effort to regulate only milk dealers in interstate commerce; therefore it is entirely distinguishable from the *Di Santo* case. Furthermore, in the case at bar it has never been contended that the license fee constitutes a tax, and it in fact is not a revenue producing measure; therefore it is entirely distinguishable from the *Texas Transport* and *McCall* cases.

It is interesting to observe that the majority opinion in the *Di Santo* case also relies upon *Shafer v. Farmers' Grain Co.*, 268 U. S. 189 (1924), wherein the opinion shows that counsel expressly "conceded" that the statute was "designed" to affect interstate commerce. In the instant case no such contention has ever been raised because the statute is obviously a general regulation of the entire milk industry of Pennsylvania, only 10% of which (R. 17) involves the handling of milk in interstate commerce. This case is more fully distinguished above, pages 12-13.

It is submitted that the instant case is controlled not by the *Di Santo* decision (and by those cases upon which it is based), but rather by *Munn v. Illinois* and the line of authorities succeeding it.

3. *Di Santo v. Pennsylvania* should be reconsidered by this Court, if the case is applicable hereto.

If the Supreme Court of Pennsylvania correctly relied upon *Di Santo v. Pennsylvania*, 273 U. S. 34 (1927), reconsideration thereof by this Court at this time is necessary and desirable from a legal, social and economic point of view. It was decided by a divided court, Mr. Justice Brandeis, Mr. Justice Stone and the late Mr. Justice Holmes dissenting. The opinion of the majority was in turn based upon cases decided by a divided court, including *McCall v. California*, 136 U. S. 104 (1889), of which Mr. Justice Brandeis, dissenting, asked "disregard" because this "would involve merely refusal to repeat an error once made" (273 U. S. 34, at 41). In *Di Santo v. Pennsylvania*, *supra*, this Court reversed the Supreme Court of Pennsylvania, the opinion of which appears in 285 Pa. 1 (1923); and yet in the instant case the Supreme Court of Pennsylvania reasserts belief in its original opinion, stating, "We have felt, and still feel that" the present type of police regulation is "peculiarly within the state's domain".

Since the decisions of this Court in the *Di Santo* and *Farmers' Grain* cases, many changes have taken place. There has come a recognition that the lives of the citizens of the United States are not limited by the boundaries of the States wherein they reside; that activities in one State often necessarily affect activities in another. Especially is this true in the milk industry, wherein "milksheds" have developed according to natural markets rather than according to State lines. Yet the problem is not national in scope because every milkshed has its own problems. Since the decision of the above cases a pronounced change has occurred in the fields of legal and governmental thought, arising from recognition that many problems of human endeavor cannot be aided or solved except by action which

accepts that State lines must be crossed. Is the only alternative intervention by the Federal Government? Under the *Di Santo* case the answer is in the affirmative; but under *Munn v. Illinois* and its succeeding cases, the answer is simply that the State may act until Congress sees fit.

It is submitted that the interstate commerce clause was never intended to compel Federal action—or none at all—in police regulation of the type herein involved. Rather, the realities of life under today's conditions compel the conclusion that the dissenting opinion in the *Di Santo* case was sound. Changed economic conditions cause modern legal thinking in the instant situation to transcend State lines without necessarily commanding Federal intervention. The *Di Santo* case is of particularly questionable authority today in view of *Townsend v. Yeomans* and *South Carolina v. Barnwell Bros.*, *supra*.

4. The position of the court below hinders stabilization of the milk industry of the United States, to the detriment of dairy farmers and the consuming public.

If the decision of the court below is the law of the land, the stabilization of the milk industry of the United States by means of milk control legislation will be greatly hindered. At least twenty States (practically all the dairy States) today have upon their statute books legislation of the necessary type involved in the instant case. Milk dealers in any State may evade all regulation by simply purchasing their milk in other States, thus creating an area without law, to the detriment of dairy farmers and the consuming public.

For example, milk dealers in any State may purchase milk within the State under their own conditions and at their own price, merely because such milk is sold outside the State—notwithstanding that it is bought at their plants in the State. The effect of this conduct is not only to break

down the price structure of the farmers in the State shipping to these milk dealers but also to create an unfair competitive condition adversely affecting the milk dealers doing intrastate business. Furthermore, the farmers and dealers in the other State to which the milk is finally shipped are also unfairly affected by "cut price" milk.

It is a matter of common knowledge that milk dealers with no assets in the State are able to, and do, in accordance with the custom of the trade, buy their milk on credit; if required to post neither license nor bond they would have the farmers at their mercy (*Rohrer v. Milk Control Board*, 322 Pa. 257 (1936)). See *Nebbia v. New York*, 291 U. S. 502 (1934) at 522, 538.

As stated above, only 10% of the milk produced in Pennsylvania is shipped to other States; yet it is common knowledge that the malpractices of a minority can disrupt an entire industry. It is impossible to maintain fair dealings in an industry within a State for the benefit of the inhabitants of the State, if here and there a milk dealer can create an area without law merely because he ultimately resells the milk in some other State. Such "no-man's-land" is increasing in area, not only within the Commonwealth of Pennsylvania but within all other States with milk control legislation, as milk dealers come more and more to realize that by crossing a State line they can evade all regulation, at least until the Federal Government sees fit to act.

It is important to note that if the position of your petitioner is sustained by this Court it will be possible for the twenty States with milk control legislation to perfect a veritable network in their stabilization efforts, because the State in which the milk is both produced and purchased will have jurisdiction to regulate. Thus we will have the converse of the situation of *Baldwin v. Seelig*, 294 U. S. 511 (1935). There it was held that the State of New York can-

not fix the price to be paid by New York milk dealers to Vermont farmers for milk sold in New York which has been produced and purchased in Vermont. This, of course, is a proper decision and simply means, as applied to the present case, that New York cannot impose upon the defendant in this case, purchasing milk in Pennsylvania, the kind of regulation which Pennsylvania is seeking to enforce. Therefore, the Commonwealth of Pennsylvania instituted the present action and it is submitted that it properly (rather than New York) has jurisdiction over the conduct of the defendant.

Conclusion.

It is respectfully submitted that the Supreme Court of Pennsylvania erred in failing to base its decision upon cases of this Court squarely controlling the instant case; that the decisions of this Court relied upon by the Supreme Court of Pennsylvania are distinguishable, and of doubtful authority today in view of very recent decisions by this Court, and in view of the trend of judicial thought arising out of changed economic conditions; that the position of the court below is detrimental to the dairy industry of the United States; that therefore a writ of certiorari should issue in order that the present questions may be reviewed by this Honorable Court.

Respectfully submitted,

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Attorney General;

HARRY POLIKOFF,

Deputy Attorney General,

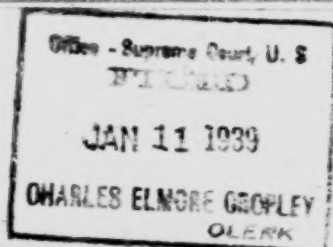
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FILE COPY

No. 426



In the Supreme Court of the United States

OCTOBER TERM, 1938

**MILK CONTROL BOARD OF THE COMMON-
WEALTH OF PENNSYLVANIA, PETITIONER,**

v.

**EISENBERG FARM PRODUCTS,
A PENNSYLVANIA CORPORATION**

BRIEF FOR PETITIONER

**On Writ of Certiorari to the Supreme Court of the
Commonwealth of Pennsylvania**

GUY K. BARD,
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Commonwealth of Pennsylvania*

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AUTHORITIES CITED

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 426

MILK CONTROL BOARD OF THE COMMONWEALTH OF
PENNSYLVANIA, PETITIONER

v.

EISENBERG FARM PRODUCTS, a Pennsylvania
Corporation

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 332 Pa. 34 and 200 Atlantic 254; it also appears in the record of the present proceedings (R. 32). This opinion, entered June 30, 1938, affirms the decree entered by the Court of Common Pleas of Dauphin County; the opinions of the latter court appear in the record of the present proceedings (R. 15, 26). One opinion of the county court (R. 15) was adopted by the supreme court (below); 332 Pa. 34, at 35.

JURISDICTION**(1) Judgment below:**

The order of the court below, the Supreme Court of Pennsylvania, was entered June 30, 1938 (R. 33). A petition for reargument and rehearing filed in said court was denied July 25, 1938 (R. 40). By order entered November 21, 1938, this Court granted a petition for a writ of certiorari to the court below.

(2) Claims and Rulings below:

The decree of the court of common pleas dismissed a bill of complaint filed against the defendant for not complying with the Milk Control Board Law of Pennsylvania, Act of April 30, 1935, P. L. 96 (31 PS Sec. 684). This decree was affirmed by the Supreme Court of Pennsylvania (R. 33). The opinion of that court, written by Mr. Chief Justice Kephart, first determined that the (1) licensing, (2) bonding and (3) minimum price provisions of the statute involved were constitutional as a valid exercise of the State police power. After reaching this conclusion that court held that the application of any provision of the statute to the defendant (engaged in interstate commerce) violated the interstate commerce clause of the Constitution; that the case was "controlled" by the decision of this Court in *DI SANTO v. PENNSYLVANIA*, 273 U. S. 34 (1927) and similar cases.

(3) Statutory Jurisdiction:

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended; 28 U. S. C., Sec. 344(b).

STATEMENT OF THE CASE

The facts in the present case, as admitted by both parties, and as determined by the Chancellor below, are as follows:

The plaintiff is the Milk Control Board of the Commonwealth of Pennsylvania, to which the Milk Control Commission is the statutory successor. The defendant is a milk dealer, a Pennsylvania corporation, which leases and operates a milk receiving plant in Elizabethville, Dauphin County, Pennsylvania (R. 16). At this plant the defendant buys milk from approximately 175 farmers in the surrounding section of Pennsylvania, who bring their milk to the plant in their individual cans. At the plant this milk is weighed and tested by the defendant, then dumped into large receiving tanks, wherein the milk is accumulated and cooled for the purpose of shipment (R. 16). This requires retention of the milk for less than twenty-four hours; the milk is transferred from the cooling tanks to tank trucks and is shipped into New York City by these tank trucks operated for defendant, the journey of said trucks being continuous from Elizabethville, Pennsylvania, to New York (R. 16). The milk is not processed in any other manner, and the cooling involved does not change the milk or its constituent parts. All of the milk thus purchased by the defendant is shipped to and resold in New York; none is sold by the defendant in Pennsylvania (R. 16).

Approximately 4,500,000,000 pounds of milk were produced in Pennsylvania in 1934, of which approximately 470,000,000 were shipped out of the State (R. 17). The nature of the dairy industry, and the purposes of the present statute, are more fully described

below. The plaintiff board, in applying the above statutory provisions to all milk dealers in Pennsylvania, also required the defendant to (1) obtain a license as a milk dealer; (2) post a bond conditioned for the payment of milk purchased from producers; and (3) pay to farmers the minimum milk prices prescribed by the board (R. 17). With these requirements the defendant refused to comply upon the ground that it was engaged in interstate commerce and therefore not subject to the statute involved. Therefore the plaintiff filed a bill of complaint to restrain the defendant from doing business as a milk dealer contrary to the above statutory provisions. The Chancellor entered a decree nisi in favor of the defendant and against the plaintiff upon August 23, 1937 (R. 24). Exceptions thereto were dismissed by the county court en banc December 7, 1937, and the bill dismissed (R. 31). This decision was affirmed by the Supreme Court of Pennsylvania June 30, 1938 (R. 33). The petition for a writ of certiorari was granted by this court on November 21, 1938.

SPECIFICATIONS OF ERROR

1. The Supreme Court of Pennsylvania erred in holding that decisions of this Court compelled the conclusion that enforcement of the Milk Control Board Law of Pennsylvania against the defendant violated the interstate commerce clause of the Constitution of the United States.

2. The Supreme Court of Pennsylvania erred in sustaining the decree dismissing the bill of complaint brought against the defendant to restrain it from do-

Question Presented
Summary of Argument

5

ing business in violation of the Milk Control Board Law of Pennsylvania (Act of April 30, 1935, P. L. 96, 31 PS Sec. 684).

QUESTION PRESENTED

May a State statute regulating the milk industry by requiring that all milk dealers obtain a license, file a bond for the protection of farmers, and pay to farmers minimum prices prescribed by an administrative agency (or any one of said requirements) be enforced against a milk dealer buying milk at its plant within the State from farmers located therein for shipment to another state?

SUMMARY OF ARGUMENT

The defendant in the present case is a Pennsylvania corporation which buys milk at its receiving plant within the State from farmers similarly located therein, which milk is daily shipped to the State of New York for resale by the defendant in the latter state. The Commonwealth of Pennsylvania is here seeking to apply the provisions of its Milk Control Board Law to the defendant with respect to his transactions with such producers, not with respect to his dealings with third persons in other states.

The statutory provisions herein involved would require the defendant (1) to obtain a license, (2) to file a bond for the protection of producers, and (3) to pay farmers the minimum prices prescribed by the Milk Control Board; however, since the statutory provisions are admittedly severable the sustaining of any

one of said requirements in its application to the defendant will require a reversal of the decree below.

The petitioner concedes that the Federal Government has authority under the interstate commerce clause to regulate the transactions here involved. However, such authority is not exclusive; and the state may legislate in exercise of its police power until and unless such legislation is superseded by valid Federal regulation.

In such cases, however, the traditional view is that the State may not "burden" or "directly affect" interstate commerce; but recent cases forego such phraseology and apply practical tests, intended by the framers of the Constitution, who primarily sought to protect non-importing states from barriers imposed by importing states, and to prevent other discriminatory legislation. Hence *MUNN v. ILLINOIS*, and subsequent granger cases, squarely sustain the very type of state police regulation here imposed upon the defendant and all other milk dealers in Pennsylvania who buy milk in the State from producers.

Each of the requirements of the statute herein is designed to protect farmers from fraud and imposition, as well as to promote the public health and public welfare in a business affected with a public interest: The evil to be remedied oppresses the farmer no less because his dealer may resell in a distant state; rather it is greater. Unless a state may protect its own inhabitants under the circumstances herein, the effect of milk control laws in twenty states will be largely nullified because the malpractices of a few can demoralize an entire industry. On the other hand, with the protection herein afforded commerce is actually facilitated.

ARGUMENT

I. A statute enacted as a valid exercise of the state police power in a matter admitting of diversity of treatment according to local conditions, which neither creates an economic barrier to commerce between states nor otherwise discriminates against such commerce, does not violate the interstate commerce clause unless and until superseded by valid federal regulation.

Article I, Section 8, Clause 3, of the Constitution of the United States, delegates to Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

This provision has been interpreted to mean, however, that in matters "admitting of diversity of treatment according to the special requirement of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act," *TOWNSEND v. YEOMANS*, 301 U. S. 447 (1937); "so long as the state action does not discriminate," *SOUTH CAROLINA v. BARNWELL BROS.*, 303 U. S. 177 (1938).

This is not a new principle. After early uncertainty upon whether the delegation of power over interstate commerce to the federal government was exclusive this Court determined otherwise to the extent above stated: *COOLEY v. BOARD OF WARDENS OF THE PORT*, 12 How. 299, 13 L. Ed. 996 (1851); see also *WILSON v. BLACKBIRD CREEK MARSH Co.*, 2 Pet. 245, 7 L. Ed. 412 (1829). The doctrine has been reaffirmed time and

time again, and as recently as *SOUTH CAROLINA v. BARNWELL BROS.*, 303 U. S. 177 (1938).

A century ago, this Court definitely recognized the distinction between state regulation of commerce as such, and state police regulations: *MAYOR ETC. OF NEW YORK v. MILN*, 11 Pet. 102, 9 L. Ed. 648 (1837). This Court there sustained a New York police statute which required masters of all vessels arriving in the port of New York to report to city officials certain information upon all passengers carried.

Police regulations fall within the second of the three classes of cases involving the respective spheres of state and federal power over commerce. These cases are tersely classified in *COVINGTON & CINCINNATI BRIDGE CO. v. KENTUCKY*, 154 U. S. 204 (1894), as follows:

The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all.

An interesting discussion of the power of the states to enact police legislation until superseded by Congress, is that appearing in *SIMPSON v. SHEPARD* (Minnesota Rate Cases), 230 U. S. 352 (1913), as follows:

But within these limitations there necessarily remains to the states until Congress acts, a wide

range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having **the most obvious and direct relation to interstate commerce**, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, **to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people**, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge

of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible. (Boldface ours)

If any requirement of the present statute is to be sustained, it must be proved to fall within the (second) class of "protective measures" above described. Some cases dealing with such measures contain language purporting to differentiate between "directly" and "indirectly" affecting interstate commerce: *SIMPSON v. SHEPARD*, 230 U. S. 352 (1913). Other cases purport to differentiate between "burdening" and "incidentally affecting" interstate commerce: *TOWNSEND v. YEOMANS*, 301 U. S. 441 (1937). But what do these broad, elastic words mean?

Regardless of the phraseology or formula used, all of these cases "rest upon their individual merits"; 2 *WILLOUGHBY, CONSTITUTION OF THE UNITED STATES* (2d Ed. 1929) Sec. 605, p. 1021. This is so true, that some of the latest decisions of this Court refuse to adhere to such formulas: *BALDWIN v. SEELIG*, 294 U. S. 511 (1935); *SOUTH CAROLINA v. BARNWELL BROS.*, 303 U. S. 177 (1938). The latter case frankly concedes that interstate commerce may be "materially interfered with" or "burdened," though sustaining the state statute under attack. This case also **defines** the distinction between a "burdensome" and an "incidental" exercise of state legislative authority with

respect to interstate commerce in a manner which reconciles the many pertinent cases upon their facts. Said the Court:

In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.

Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with **the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.** *Sproles v. Binford*, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581, *supra*; *Stephenson v. Binford*, 287 U. S. 251, 272, 77 L. ed. 288, 298, 53 S. Ct. 181, 87 A. L. R. 721. (Boldface ours.)

The Court reached these conclusions after the most exhaustive examination of the thought underlying the

rule, interpreting it as the desire to avoid "gain for those within the state an advantage at the expense of those without" (see footnote 2). Certainly this is reflected in the letter of James Madison to J. C. Cabell, written February 13, 1829, appearing in 3 Farrand, Records of the Constitutional Convention (1911) 478:

It is very certain that it [the interstate commerce clause] grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

Directly in point with the above is *COVINGTON & CINCINNATI BRIDGE Co. v. KENTUCKY*, 154 U. S. 204 (1894), *supra*. The statute herein was invalidated for the following reasons:

It is clear that the state of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but **from Ohio to Kentucky**, a right which practically nullifies the corresponding right of Ohio to fix tolls from her own state.
* * * (Boldface ours)

This Court, in *BALDWIN v. SEELIG*, 294 U. S. 511 (1935), unanimously determined that "formulas and catchwords are subordinate" to one "overmastering requirement" (page 527), stated as follows:

What is ultimate is the principle that one state in its dealings with another may not place itself

in a position of economic isolation * * * Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.

In this case too the Court has defined "direct" burdens, as follows (522) :

* * * Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis.* * *

An accurate concept of what constituted objectionable state interference with interstate commerce, in the minds of the framers of the Constitution, is obtained by examining Article IV of the Articles of Confederation; certainly the problem was the same in 1777 and 1787. This reads: "The better to secure and perpetuate mutual friendship and intercourse * * * the people of each state shall have free ingress and regress **to and from any other State**, and shall enjoy therein all the privileges of trade and commerce, **subject to the same duties, impositions and restrictions as the inhabitants thereof respectively**, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant. * * *" Thus, it is clear that the essence of unjustified interference was discrimination, and the above authorities show that such discrimination was mainly feared

in the case of **importing** states legislating against non-importing states. Here Pennsylvania, the **exporting** state, is legislating.

In applying these principles to the case at bar, and facing issues instead of language, we find these issues resolved into two tests:

1. Is the Milk Control Board Law of Pennsylvania a valid exercise of the state police power?
2. Does the Milk Control Board Law of Pennsylvania, in its application to the present defendant and all others engaged in buying milk within the state, create an economic barrier between states or otherwise discriminate against interstate commerce?

It is submitted that the present statute meets these tests in a manner which brings the case directly within the principle that a valid exercise of the state police power, in a matter admitting of diversity of treatment according to local conditions, which neither creates a barrier to commerce between states nor otherwise discriminates against such commerce, does not violate the interstate commerce clause unless and until superseded by valid Federal regulation.

However, consideration of the present case involves three separate and distinct problems arising out of the severable character of the statutory provisions at issue. See section 22 of the statute, and the Statement of the Case (R. 15). Hence the foregoing queries must be addressed separately to the (1) licensing,

(2) bonding, and (3) price provisions of the law, and to each said provision.

II. The Milk Control Board Law is a Valid Exercise of the State Police Power

A. THE STATUTE

The essential provisions of the Pennsylvania Milk Control Board Law (Act of April 30, 1935, P. L. 96; 31 P. S. Sec. 684) are as follows: Section 1 declares the milk industry of the Commonwealth to be a business "affected with a public interest." Section 3 defines a milk dealer as any person "who purchases or handles milk within the Commonwealth for sale, shipment, storage, processing or manufacture within or without the Commonwealth." Section 4 creates a Milk Control Board, upon which sections 5, 6, 7 and 8 confer authority to investigate, supervise and regulate the milk industry. Section 9 imposes penalties for violations of the law or orders issued by the board pursuant thereto.

Section 10 provides that a milk dealer "shall not buy milk from producers or others within this Commonwealth for storage, manufacture, processing, distribution, or sale within or without this Commonwealth, or sell or distribute milk within this Commonwealth, unless such dealer be duly licensed as herein provided." Applicants are required to state certain information.¹

¹ Section 10 C. "The applicant shall state the following:

(1) The nature of the business to be conducted.

(2) The full name of the person applying for the license. If the applicant be a co-partnership or association, the full name of each member shall be stated. If the applicant be a corporation, the names and addresses of all officers and directors shall be stated. (Footnote continued)

Licenses may be refused, suspended or revoked for certain practices² by the dealer.

Section 11 imposes certain license fees, graded according to volume of milk handled, varying from \$1.00

(3) The city, borough, incorporated town or township, and the street number, if any, at which the business is to be conducted.

(4) The financial condition of the applicant, including a comprehensive financial statement of his affairs.

(5) Facts showing that the applicant has adequate technical personnel and adequate technical and physical facilities properly to conduct the business of receiving and handling milk, that he has complied with all rules, regulations and orders of the board filed or served as required in this act, and such other facts with respect to the license as may be required by the board pursuant to this act."

²Section 10 D. "The board shall grant a license to an applicant complying with the provisions of this act and of the rules and regulations issued by the board pursuant thereto. The board may decline to grant a license to an applicant, or may suspend, revoke or refuse to transfer a license already granted to a milk dealer or may prohibit a milk dealer exempted from the license requirements of this act from continuing to operate as a milk dealer, when satisfied that he has—

(1) Rejected, without reasonable cause, any milk purchased from a producer, or has rejected, without either reasonable cause or reasonable advance notice, milk delivered by or on behalf of a producer in ordinary continuance of a previous course of dealing, except where the contract has been lawfully terminated: Provided, however, That in the absence of an express or implied fixing of a longer period in the contract, (reasonable advance notice) shall not be construed to mean notice of less than one week nor more than two weeks.

(2) Without reasonable cause, failed to account and make payment for any milk purchased from a producer.

(3) Committed any act injurious to the public health or public welfare or to trade or commerce in demoralization of the price structure of milk to such an extent as to interfere with an ample supply thereof for the inhabitants of the Commonwealth affected by this act. . . .

(4) Made a general assignment for the benefit of creditors, or has been adjudged a bankrupt, or there has been entered against him a judgment upon which an execution has been returned wholly or partly unsatisfied.

(5) Been a party to a combination to fix prices contrary to law. . . .

(6) Continued in a course of dealing of such nature as to satisfy the board of an intent of the milk dealer to deceive or defraud producers or consumers.

(7) Failed either to keep records or to furnish the statements or information required by the board.

(8) Made any statement upon which the license was issued which statement is found to have been false or misleading in any material particular.

(9) Where the milk dealer is a partnership or corporation and any individual holding any position, owning any substantial interest therein, or having any power of control therein, has previously been responsible, in whole or in part, for any act on account of which a license may be denied, suspended or revoked pursuant to the provisions of this act.

(10) Where the milk dealer has violated any of the provisions of this act, or any of the rules, regulations or orders of the board."

per annum for dealers handling 20 pounds of milk daily to \$5,000 for dealers handling 1,000,000 pounds daily, which fees are payable into a special "Milk Control Fund" for expenses in administering the statute (see Section 17).

Section 12 provides that "a license shall not be issued to a milk dealer purchasing milk from producers within this Commonwealth unless the milk dealer shall execute and file with the application a personal bond approved by the board, * * * conditioned for the prompt payment by the licensee of all amounts due to producers, under this act and the orders of the board, for milk sold by them to such licensee subsequent to the posting of such bond, upon such terms and conditions as the board may prescribe."

Under certain circumstances the board may require a surety or collateral bond instead of a personal bond.

Section 14 prescribes procedure upon appeals from orders of the board.

Sections 15 and 16 authorize the board to require the keeping of certain records and the filing of reports by dealers.³

³"Section 15. Records.—The board may require licensees to keep the following records:

(1) A record of all milk received, detailed as to location and as to names and addresses of producers or milk dealers from whom received, with butterfat test, prices paid, and deductions or charges made.

(2) A record of all milk sold, classified as to grade, location, and market outlet, and size and style of container, with prices and amounts received therefor.

(3) A record of quantities and prices of milk sold.

(4) A record of the quantity of each milk product manufactured, the quantity of milk used in the manufacture of each product, and the quantity and value of milk products sold.

(5) A record of wastage or loss of milk or butterfat. (Footnote continued)

Section 18 directs the board, with the approval of the Governor, to "fix by official order, the minimum prices to be paid by milk dealers to producers and others for milk." The price may vary according to the production area, sales area, use, form, grade or class of the milk (Section 18-D).

Section 22 provides expressly that the provisions of the law are severable.*

The above Act of 1935 was repealed by the Act of April 28, 1937, P. L. 417, but all proceedings under the former statute were saved by Section 1203 of the latter: *COMMONWEALTH v. GEORGE ORTWEIN*, trading as *EAST END DAIRY*, 200 Atl. (Pa. Super., 1938) 859.

B. THE LEGISLATIVE PURPOSE

The production, sale and distribution of milk and certain milk products in Pennsylvania have been attendant with serious conditions affecting milk producers, milk dealers and consumers of milk. Hence the General Assembly made a legislative investigation

(6) A record of the items of the spread or handling expense and profit or loss, represented by the difference between the price paid and the price received for all milk.

(7) A record of all other transactions affecting the assets, liabilities, or net worth of the licensee.

(8) Such other records and information as the board may deem necessary for the proper enforcement of this act.

"Section 16. Reports—A. Each licensee shall from time to time, as required by rule or order of the board, make and file a verified report, on forms prescribed by the board, of all matters on account of which a record is required to be kept, together with such other information or facts as may be pertinent and material within the scope of the purposes and intent of this act. Such report shall cover a period of time specified in the order."

* "Section 22. Constitutional Construction.—It is hereby declared to be the legislative intent that if this act cannot take effect in its entirety because of the decision of any court holding unconstitutional any part hereof, the remaining provisions of the act shall be given full force and effect as completely as if the part held unconstitutional had not been included herein."

pursuant to resolution adopted in 1933 and continued by further resolution; approved May 25, 1933, P. L. 1034. As a result the Milk Control Board Law of 1934, Act of January 2, 1934, P. L. 174 was enacted. This statute was reenacted (and amended) by the law herein at issue, the Milk Control Board Law of 1935, approved April 30, 1935, P. L. 96 (31 PS Sec. 684), extending the former act for a period of two years. In 1937 the General Assembly made further legislative findings of fact with respect to the milk industry of Pennsylvania, resulting in the Act of April 28, 1937, P. L. 417, which clarified, strengthened and codified various milk regulations including the earlier measures. These various acts of the legislature,⁴ the courts⁵ of the Commonwealth and official surveys⁶ have described the dairy industry as follows:

* 1. Milk is the most necessary human food, vital for promotion of the public health and for development of strength and vigor in the race. It is a most

⁴ Four successive sessions of the General Assembly, as above shown have enacted measures to create and strengthen milk control in Pennsylvania.

⁵ Rohrer v. Milk Control Board, 322 Pa. 257 (1936); the decision of the court below (R. 32) in the present case, 332 Pa. 34 (1938); and Harrisburg Dairies Inc. v. Eisaman et al., (1938), (Court of Common Pleas of Dauphin County, Pa.) Appendix A.

⁶ See Report of Federal Trade Commission, Sale and Distribution of Milk Products (Connecticut and Philadelphia Milksheds) House Document No. 152, 74th Congress, 1st Session (1935); Report of Federal Trade Commission, Sale and Distribution of Milk Products (Connecticut and Philadelphia Milksheds) House Document No. 378, 74th Congress, 2nd Session (1936); Gaumnitz and Reed, Some Problems Involved in Establishing Milk Prices (U. S. Dept. of Agriculture, 1937) 42, et seq.; Cowden and Fouse, Supply and Utilization of Milk in Pennsylvania (Pa. State College, 1936) Bulletin No. 327; and others.

* The following 6 (numbered) paragraphs are taken almost verbatim from the preamble of the Act of April 28, 1937, P. L. 417, which recites "legislative findings of fact" pertaining to the milk industry of Pennsylvania. These findings, however, also explain conditions existing when the statute here involved, Act of April 30, 1935, P. L. 96, was enacted, but which conditions were only partly set forth in the preamble to the 1935 Act. **These legislative findings have been confirmed by judicial inquiry:** see Appendix A, and citations in footnote 5, supra.

fertile field for the growth of bacteria, and therefore its production and distribution have been surrounded by more costly sanitary requirements than those of any other commodity in Pennsylvania, which is the third greatest milk producing and consuming state of the nation.

2. Milk consumers are not assured of a constant and sufficient supply of pure, wholesome milk unless the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk. If this is not done, large numbers dispose of their herds or engage in milk strikes, and remaining producers supply unhealthful milk or milk of lower quality because of financial inability to comply with sanitary requirements and to keep vigilant against contamination. Public health is menaced when milk dealers do not or cannot pay a price to producers commensurate with the cost of sanitary production, or when consumers are required to pay excessive prices for this necessity of life.

3. Milk dealers must handle constant surpluses to meet the emergency requirements of normal variations in fluid consumption and to meet seasonal variations in production, which amounts in excess of fluid requirements must find a market in fluid use or in manufacture, and tend to demoralize the industry. Only one per centum of the milk dealers of the Commonwealth handle over sixty per centum of the milk sold by producers to dealers; and persons have often combined privately to establish practices or fix prices to the detriment of producers or consumers.

4. Milk producers must make delivery of their highly perishable commodity immediately after it is produced, and must generally accept any market at any price. Under the utilization method⁶ of payment prevailing in the milk industry, particularly in cities, the value of this market is unknown until the milk dealer sells the fluid milk and uses or disposes of the surplus. Furthermore, only the dealers have facilities for accurately weighing and testing milk. This knowledge of weights, tests and uses is in the exclusive possession of the dealer.⁷ The producers' lack of control over their market is aggravated by the trade custom of dealers in paying weeks after delivery, keeping producers obligated to continue delivery in order to receive payment for previous sales, and permitting dealers to operate on the producers' capital without giving security therefor. Hence, milk producers are subject to fraud and imposition, and do not possess the freedom of contract necessary for the procuring of cost of production.

5. Public control of the milk industry in recent years is stabilizing the conditions therein, and continuation thereof is designed to prevent a return to the unhealthy, uneconomic, deceptive and destructive practices⁸ of the past with respect to this paramount industry upon which the health and welfare⁹ of the Commonwealth largely depend.

⁶ Fully described in *Colteryahn-Sanitary Dairy v. Milk Control Commission*, 332 Pa. 15 (1938) at 28.

⁷ This is the subject of much discussion in the reports of the Federal Trade Commission, *supra*, note 6.

⁸ Some of the practices to which producers are subjected are apparent in the statutory grounds for refusing and revoking milk dealers' licenses, *supra* note 2, page 16.

⁹ The following appears in the brief (p. 57) filed by the Commonwealth in the Rohrer case, *supra*: "(a) Pennsylvania is the third greatest milk

6. It is necessary to preserve and promote the strength and vigor of the inhabitants of Pennsylvania, to protect the public health and welfare, and to prevent fraud and imposition upon consumers and producers by treating the production, transportation, manufacture, processing, storage, distribution, and sale of milk in the Commonwealth of Pennsylvania as a business affecting the public health and affected with a public interest.¹⁰

C. THE STATE POLICE POWER

The above discussion of (a) the statute herein at issue and (b) the purpose thereof is intended to develop that it is a reasonable means adopted to remedy certain public evils within the Commonwealth, and therefore a proper exercise of the state police power. The highest courts of the State have so held, particularly with respect to the provisions requiring that milk dealers (1) obtain licenses, (2) file bonds, (3) pay minimum prices to producers and (4) furnish reports and information.

The first decision sustaining milk control in Pennsylvania is that of *ROHRER v. MILK CONTROL BOARD*,

producing state in the United States. In 1934, its total production of milk on farms amounted to 4,495 million pounds, exceeded only by Wisconsin and New York. The amount of milk sold by producers to milk dealers amounted to 2,690 million pounds exceeded only by Wisconsin and New York. See Year Book of Agriculture (1935) Tables 387, 388 (U. S. Department of Agriculture).

"(b) The dairy industry supplies more income to Pennsylvania farmers than any other branch of agriculture. In round numbers, 55 percent of the land of the State of Pennsylvania, or over 15 million acres, were devoted to agriculture in 1934. 47 percent of the entire income of all persons engaged in agriculture in Pennsylvania during that year was derived from dairy products. In 33 counties of the State, 50 percent of the income of the farmer came from dairy products; in 11 counties, 60 percent came from this source. See Bulletin Almanac (1936) 124, 125."

¹⁰ *Carolene Products Company v. Harter et al.*, 329 Pa. 49 (1938) at 60; *Rohrer v. Milk Control Board*, 322 Pa. 257 (1936).

322 Pa. 257 (1936). As recently as June 30, 1938, the Supreme Court of the Commonwealth, in *COLTERYAHN SANITARY DAIRY v. MILK CONTROL COMMISSION*, 332 Pa. 15 (1938) at 20, unanimously followed the Rohrer case, as follows:

A number of questions have been raised for the consideration of this Court which will be discussed as presented. We held that the former Milk Control Law (Act of January 2, 1934, P. L. 174) regulating the milk industry by requiring dealers to be licensed and to give bonds with the power in the Board to fix minimum and maximum prices, was a valid exercise of the police power. *Rohrer v. Milk Control Board*, 322 Pa. 257. The present Act, so far as constitutional questions are concerned, is well within our prior decision, and we need not concern ourselves with that question at this time.

The court below (the Supreme Court of Pennsylvania) in the instant case likewise held (R. 32):

Before passing on the question presented to the court below as to whether the legislature may, through the Milk Control Law, prescribe certain regulations such as licensing, bonding and minimum prices for producers or dealers in the milk industry, effective where the product is purchased and destined for interstate commerce, we must first decide whether these provisions are valid police regulations under our Constitution. If they are not, then the questions under the commerce clause of the Federal Constitution need not be considered.

We have held in *Colteryahn Sanitary Dairy v. Milk Control Commission*, and *Keystone Dairy Co. v. Milk Control Commission* 332 Pa. 15, that the Act of January 2, 1934, P. L. 174, and the Acts

of April 30, 1935, P. L. 96, and April 28, 1937, P. L. 417, amending and reenacting its provisions, are constitutional. See *Rohrer v. Milk Control Board*, 322 Pa. 257, where it was held that licensing and price-fixing had a direct and substantial relation to sanitation, public health and public welfare. While bonding was not specifically mentioned, it was listed and necessarily included as it was one of the questions in the case. It was conceded at the argument in the present case that the Court could take judicial notice of the fact that licensing and bonding do bear a necessary relation to the preservation and continuation of an adequate supply of pure milk, a necessary article of food in the State, and are in the interest of sanitation and public health.

These provisions are also a protection against the danger of fraud to the producer and public so well described by President Judge Keller in *Rohrer v. Milk Control Board*, *supra*. Such regulations, tending to prevent strikes and the dumping of the product on the market, harmful to the public; to provide a fair price and secure its payment, are necessary to prevent cutting off the supply to the public and to assure its purity and necessary quality. With this end in view the bonds are required as securities for the extension of credit by producers, to prevent fraud and imposition on them, and to eliminate irresponsible and dishonest dealers who are a constant menace to the consuming public. Bonding is therefore related to this legitimate purpose, which is a proper exercise of the police power.

Upon their facts both the *Rohrer* case and the opinions below in the present case sustain the (1) licensing, (2) bonding (3) price provision of the milk control laws. The *Colteryahn* case sustains, inter

alia, the provisions pertaining to prices; and the furnishing of reports and information (332 Pa. at 21 and 33). Another appellate court decision, *COMMONWEALTH v. ORTWEIN*, individually and trading as *EAST END DAIRY*, 200 Atl. (Pa. Super., 1938) 859, follows the four aforementioned decisions particularly as to bonding. Another case has recently reaffirmed that the milk industry of Pennsylvania is a business affected with a public interest: *CAROLINE PRODUCTS CO. v. HARTER, ET AL.*, 329 Pa. 49 (1937) at 60.

Thus, a definite legislative and judicial policy in Pennsylvania has determined that the statutory requirements here at issue are a valid exercise of the state police power. Furthermore, this cannot now be disputed because of the agreement of facts in the present case by which only the commerce question is submitted (R. 15).

Under such circumstances, the Supreme Court of the United States will not set aside the statute of a State. In *NEBBIA v. NEW YORK*, 291 U. S. 502 (1934), at 539, this Court held as follows:

If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the

industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other.

As recently as *HIGHLAND FARMS DAIRY, INC. v. AGNEW*, 300 U. S. 608 (1937), this Court held, at 611:

The power of a state to fix a minimum price for milk in order to save producers, and with them the consuming public, from price cutting so destructive as to endanger the supply, was affirmed by this court in *Nebbia v. New York*, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469, and in other cases afterwards. *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 79 L. ed. 259, 55 S. Ct. 7; *Borden's Farm Products Co. v. Ten Eyck*, 297 U. S. 251, 80 L. ed. 669, 56 S. Ct. 453.

This case sustained both licensing and price regulation of milk dealers.

In *PAYNE v. KANSAS*, 248 U. S. 112 (1918) it was held with respect to licensing and bonding of commission merchants:

Manifestly, the purpose of the state was to prevent certain evils incident to the business of commission merchants in farm products by regulating it. Many former opinions have pointed out the limitations upon powers of the states concerning matters of this kind, and we think the present record fails to show that these limitations have been transcended. *Rast v. Van Deman & L. Co.* 240 U. S. 342. L. ed. 679, L. R. A. 1917 A. 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917 B, 455; *Brazee v. Michigan*, 241 U. S. 340, 60 L. ed. 1034, 36 Sup.

Ct. Rep. 561, Ann. Cas. 1917 C, 522; *Adams v. Tanner*, 244 U. S. 590, 61 L. ed. 1336, L. R. A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973.

See also *MUNN v. ILLINOIS*, 94 U. S. 113 (1876); *TOWNSEND v. YEOMANS*, 301 U. S. 441 (1937) (rates for handling grain and tobacco, respectively.)


In *BALDWIN v. SEELIG*, 294 U. S. 511 (1935) it was held that the State of New York cannot fix the price to be paid by New York milk dealers to Vermont farmers for milk sold by such dealers in New York which has been produced and purchased in Vermont, either directly or by prohibiting resale in New York. The present case is quite different, for Pennsylvania (the legislating state herein) is in the factual position of Vermont instead of New York. In *BALDWIN v. SEELIG* one state (New York) legislated for the inhabitants of another (Vermont), **the very action condemned and feared by the framers of the Constitution.** In the present case, Pennsylvania is instead applying the very remedy suggested in *BALDWIN v. SEELIG*:

New York has no power to project its legislation into Vermont by regulating the price of milk to be paid in that state for milk acquired there (521).

If farmers or manufacturers in Vermont are abandoning farms or factories or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy (524).

Squarely in accord with the above rule, see *SLIGH v. KIRKWOOD*, 237 U. S. 52 (1915) (quoted below);

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NEW MEXICO v. DENVER & RIO GRANDE R. Co., 203 U. S. 38 (1905); and see *MUNN v. ILLINOIS*, 94 U. S. 113 (1876).

Thus, although it is beyond the police power of New York State to protect Pennsylvania (or Vermont—*Baldwin v. Seelig*) producers, the four cases above cited hold that Pennsylvania may exercise its police power to give its own producers police protection notwithstanding that the purchaser of their supply ships extra-state.

Therefore it only remains to determine whether the valid police regulations under discussion, or any one of said regulations (the statute being severable) violate the interstate commerce clause.

III. The Milk Control Board Law Does Not Violate the Interstate Commerce Clause.

A. THE STATUTE PRESENTS NO BARRIER TO COMMERCE BETWEEN STATES

It is now necessary to apply the second test expressed upon page 14 *supra*: **does the statute in the instant case create an economic barrier between states or otherwise discriminate against interstate commerce?** This is the practical approach, the realistic test to be applied under the recent decisions in order to determine whether the present statute falls within the earlier cases held merely to “indirectly” or “incidentally” affect interstate commerce, or rather within those held to “burden”, “unduly burden” or “directly affect” such commerce. In this connection it is

reiterated that the three statutory requirements herein involved are severable; that the (1) licensing; (2) bonding and (3) price provisions should be judged upon the individual merits of each requirement; by stipulation (R. 15) it is agreed that if any single requirement is valid, judgment shall be entered for the plaintiff petitioner.

It is submitted that the "Granger Cases", *MUNN v. ILLINOIS*, 94 U. S. 113 (1876) and later cases based thereon, hereafter noted, are ample authority for the petitioner's contention that the present statute is consistent with the interstate commerce clause.

In the granger cases, as in the case at bar, the business is one affected with a public interest: prevention of fraud and imposition upon farmers, and promotion of public welfare, are the impelling reasons for legislation prescribing (1) licenses, (2) bonds and (3) rates for operators of grain elevators. These reasons, as well as protection of health, also support the legislation here under attack; see above. In every case, **the legislating state is an exporting state**, rather than an importing state.

The activities of warehouses which collect grain for the purpose of shipping such grain in interstate commerce are in every essential respect (except that milk must be refrigerated) identical with the activities of the defendant in the case at bar, who collects milk instead of grain for the purpose of shipping it in interstate commerce. In both instances the farmer is virtually at the mercy of the purchaser or shipper in

the grading, weighing and shipping of his supply. That milk is more perishable than grain, and must therefore move daily without fail, is a difference which would tend to strengthen rather than weaken the analogy. The reasons prompting application of the instant statute to all buyers of milk, including those shipping in interstate commerce, are probably more pressing (in view of the perishable character of the commodity) than the reasons advanced in the grain cases.

It will be observed that the producer and seller of grain may at least hold on to his commodity an extra day, week or month, in the event that he is dissatisfied with the purchaser and warehouseman thereof, with the price or storage rate that he is to receive or pay, with the grading or with the accounting therefor. On the other hand, the producer of fluid milk has no such opportunity to seek another purchaser because the perishable character of his commodity necessitates that he sell his milk immediately, waste it or drink it himself.

Furthermore, if a purchaser of grain fails to pay for it there is a possibility that he at least has the grain, against which some process may issue upon action by the producer seeking to recover payment therefor. This, however, is hardly the case in the relationship between the producer and milk dealer. The dealer does not, in fact cannot, hold on to a supply of milk because of its perishable character and because of the nature of the milk business. Therefore, the producers of the milk have far less opportunity to issue process

against the commodity than in the case of the grain growers.

Because only daily quantities are accumulated, milk receiving stations such as that of the defendant herein (R. 13) are small and the equipment inexpensive, whereas grain warehouses may be larger and more costly. Hence the tendency towards fly-by-night handlers is greater in the case of milk than in the case of grain.

The tendency toward monopoly is as great among milk handlers as among grain handlers; and in both instances prices are subject to transactions at distant exchanges: Reports of the Federal Trade Commission, cited note 6, *supra*; see also Summary Report, submitted to the Congress January 4, 1937; *ROHRER v. MILK CONTROL BOARD*, 322 Pa. 257 (1936), at 265.

Both the grain grower and milk producer dispose of their commodity in a transaction which takes place at the established place¹¹ of business conducted by the warehouseman or milk dealer within the state, the identity of and title to the farmer's supply being lost

¹¹ Milk dealers in the 16 Pennsylvania counties included in the New York milkshed purchase monthly 59,840,000 pounds of milk from producers, of which 57,187,000 pounds are shipped monthly mainly to points in Pa. or N. Y. through receiving stations or receiving plants such as the present defendant's. The difference is used *within* the counties; the milk is *not* delivered or sold to persons outside the area involved *except through such plants*. (This is to be expected since milk must be cooled and handled through such plants in order to be shipped distances without spoiling and economically). Cowden and Fouse, *Supply and Utilization of Milk in Pennsylvania* (Pa. State College, 1936) Bulletin No. 327, Tables V, VIII (data based upon month of April, 1934). This survey was published subsequently to the preparation of the agreed facts herein (R. 13) which estimated that 470,000,000 pounds of milk are annually shipped to other states (R. 14); the survey, however, shows 50,616,000 pounds of milk monthly as the accurate figure (Table 47).

there as well. In both instances (1) the commodity is produced within the state, (2) title passes within the state (3) to a purchaser within the state (4) operating a plant within the state (5) at which plant the commodity is weighed, graded, etc., and (6) stored for shipment, (7) thence shipped extra-state.

In both instances, the (1) license, (2) bond and (3) rate is with respect to the transaction between the producer and the operator of the plant within the state. **In neither instance does the requirement attach to the transaction between the operator and the person in the other state to whom he resells**—condemned in *HIGHLAND FARMS DAIRY, INC. v. AGNEW*, 300 U. S. 608 (1937) and *BALDWIN v. SEELIG*, 294 U. S. 511 (1935).

In view of the similar character of the relationship between producers and handlers of grain and those of milk, it is beyond dispute that similar provisions for the (1) licensing and (2) bonding of persons operating gathering stations for these commodities have the same police purpose and a similar effect upon interstate commerce. The severability of these requirements in the instant case has already been noted.

In comparing grain handling rates with milk prices, the similarity of their effect upon interstate commerce may be less obvious; but the analogy is almost as strong, and neither is more burdensome than the other. If storage rates are prescribed too low, interstate commerce will be impeded in the same manner as though grain prices (or milk prices) are prescribed

too high. If a maximum rate prescribed for warehouse charges is too low warehousemen will go out of business and grain shipment in interstate commerce would become impossible. Similarly, if minimum producer prices are prescribed too high for milk shipped in interstate commerce, such shipments would cease. The effect of the law upon interstate commerce is identical in both situations. Neither is a greater barrier or impediment to interstate commerce than the other.

In truth, the fifth and the fourteenth amendments of the Constitution of the United States are designed to protect warehousemen and milk dealers from rates or regulations which are confiscatory. The remedy lies there, but not within the interstate commerce clause.

Let us examine the granger cases:

MUNN *v.* ILLINOIS, 94 U. S. 113 (1876) arose upon information filed against certain warehousemen for transacting business without a license. Salient features of the Illinois statute involved are described at page 137:

* * * The Act prescribed the maximum of charges which the proprietor, lessee, or manager of the warehouse was allowed to make for storage and handling of grain, including the cost of receiving and delivering it, for the first thirty days or any part thereof, and for each succeeding fifteen days or any part thereof; and it required him to procure from the circuit court of the county a license to transact business as a public warehouseman, and to give a bond to the people of the State in the penal sum of \$10,000 for the faithful per-

formance of his duty as such warehouseman of the first class, and for his full and unreserved compliance with all laws of the State in relation thereto. The license was made revocable by the circuit court upon a summary proceeding for any violation of such laws. * * *

Thus, the statute there under attack involved the very requirements of the Pennsylvania Milk Control Law now at issue, to wit, (1) licensing, (2) bonding, (3) paying prescribed charges. The question was squarely raised as to whether the statute under consideration conflicted with the power of Congress to regulate interstate commerce. Said the Court, per Mr. Chief Justice Waite, at page 135:

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the State Tax on R. Gross Receipts, 15 Wall., 293, 21 L. ed., 167, that "It is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution."

The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government

over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction.

Earlier the Court had stated (134) :

The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied.

BRASS v. STATE OF NORTH DAKOTA, 153 U. S. 391 (1894) involved the constitutional validity of the act of North Dakota, which (as that in the present case) prescribed (1) licensing, (2) bonding, and (3) rates for operators of elevators or warehouses where grain or other property was stored for compensation. The statute was described (at 399) as requiring "that those who conducted such public warehouses located in cities containing not less than one hundred thousand inhabitants should procure licenses and should give bond conditioned for compliance with the law; prescribe maximum rates for storage and handling grain; and declared certain penalties for the failure to procure licenses." This court, relying upon *MUNN v. ILLINOIS*, supra, and *PEOPLE v. BUDD*, 143 U. S. 517 (1892), sustained the constitutionality of the North Dakota statute. Said the Court, in holding that the act did not violate the interstate commerce clause (at 405) :

* * * We are limited by this record to the questions whether the legislature of North Dakota, in regulating by a general law the business and charges of public warehouses engaged in elevating and storing grain for profit, denies to the

plaintiff in error the equal protection of the laws or deprives him of his property without due process of law, and whether such statutory regulations amount to a regulation of commerce between the states. The allegations and arguments of the plaintiff in error have failed to satisfy us that any solid distinction can be found between the cases in which those questions have been heretofore determined by this court and the present one.

W. W. CARGILL Co. v. STATE OF MINNESOTA, 180 U. S. 452 (1900) was an action identical with the present, to wit, an action by the state to enjoin the operation of an elevator-warehouse until the defendant procured a license under a Minnesota statute, which required owners of such warehouses to (1) procure a license, (2) charge certain rates, (3) keep certain records, (4) use certain methods. This statute made it "unlawful to receive, ship, store or handle any grain in any such elevator or warehouse, unless the owner or owners thereof shall have procured a license" (pages 459, 460). The statute directed a state railroad and warehouse commission to prescribe rates of charges for the receipt, storage, handling and shipment of grain therein and therefrom. Persons operating warehouses were required to keep a "true and correct account in writing, in proper books, of all grain received, stored and shipped at such elevator or warehouse," stating the weight, grade and dockage, etc. Methods of grading and the issuance of warehouse receipts were also regulated, and certain reports to the Commission prescribed. Said a unanimous Court (at 468, 470) :

* * * We cannot question the power of the state, so far as the Constitution of the United States is

concerned, to require a license for the privilege of carrying on business of that character within its limits,—such a license not being required for the purpose of forbidding a business lawful or harmless in itself, but only for purposes of regulation. * * *

* * * * *

It is also contended that the requirement of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the states. This view cannot be accepted. The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state or the shipment out of the state of such grain as it purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in respect of business conducted at an established warehouse in the state between the defendant and the sellers of grain. We do not perceive that in so doing the state has intrenched upon the domain of Federal authority, or regulated or sought to regulate interstate commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license.

MERCHANTS EXCHANGE OF ST. LOUIS *v.* STATE OF MISSOURI, 248 U. S. 365 (1919) arose upon a writ of error to review a judgment ousting a board of trade from the power of weighing grain received into and discharged from public warehouses and elevators, and of issuing of certificates and making charges for such services. A statute of Missouri required weighers to be (1) licensed, and (2) bonded; it prohibited any person from issuing weight certificates, or charging for weighing "other than a duly authorized and bonded state

weigher." Said the Court, in a unanimous opinion, per Mr. Justice Brandeis:

* * * The regulation of weights and measures with a view to preventing fraud and **facilitating commercial transactions**, is an exercise of the police power. * * * (Boldface ours)

Second, Section 63 does not violate the commerce clause of the Constitution. The contention that it does was rested below solely on the ground that the prohibition, as applied to grain received from or shipped to points without the state, burdens interstate commerce. It clearly does not. *Pittsburgh & S. Coal Co. v. Louisiana*, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 16 Sup. Ct. Rep. 459; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423. * * *

BUDD v. STATE OF NEW YORK, 143 U. S. 517 (1892) arose upon an indictment against the manager of an elevator and warehouse for receiving and discharging grain in the City of Buffalo, New York, and charging an excessive rate therefor. In this case the Supreme Court, per Mr. Justice Blatchford, not only adopted relevant portions of the opinion in *Munn v. Illinois*, *supra*, in sustaining the New York statute as a proper exercise of the state police power, but also held the statute consistent with the interstate commerce clause, as follows:

So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the State of New York. It operates only within the limits of that State, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in *Munn v. Illinois*. It is of

the same character with navigation laws in respect to navigation within the State, and laws regulating wharfage rates within the State and other kindred laws.

It was conceded, and the Court found, (at 544-545) as follows :

In the actual state of the business the passage of the grain to the city of New York and other places on the seaboard would, without the use of elevators, be practically impossible. The elevator at Buffalo is a link in the chain of transportation abroad by sea. The charges made by the elevator influence the price of grain at the point of destination on the seaboard, and that influence extends to the prices of grain at the places abroad to which it goes. The elevator is devoted by its owner, who engages in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good.

In summary of the granger cases, it is found that the statutes required (1) licensing, (2) bonding, and (3) payment of certain rates in *Munn v. Illinois*, and *Brass v. North Dakota*. The statutes required (1) licensing, and (2) bonding in *Merchants Exchange v. Missouri*; (1) licensing, and (3) payment of certain rates, in *Cargill v. Minnesota*; and (3) payment of certain rates in *Budd v. New York*. In all cases the language of the Court was sufficiently broad to justify the conclusion that none of the three requirements, taken together or singly, violated the interstate commerce clause. These cases were discussed, approved and followed by this Court as recently as *TOWNSEND*

v. YEOMANS, 301 U. S. 447 (1937) (tobacco handling rates).

The granger statutes—and the Milk Control Board Law—do not violate the interstate commerce clause because (applying the required tests) they create no economic barrier between states, and do not otherwise discriminate against such commerce. In fact, these acts **promote and encourage** interstate trade, because this is the inevitable effect of laws which protect persons from fraud, imposition and unfair trade practices.

Of special importance is this with respect to milk producers, who, by such protective laws, are encouraged to ship their milk long distances to city dealers whom they do not know or see, rather than accept the convenience and safety attendant to selling their supply locally: *PEOPLE v. PERETTA*, 253 N. Y. 305 (1930).

Certainly legislation encourages commerce which tends “to eliminate irresponsible and dishonest dealers”: the court below (*R. 33*); and which is “stabilizing” an industry hitherto fraught with “unhealthful, uneconomic, deceptive and destructive practices”: legislative findings in Preamble to Act of April 28, 1937, P. L. 417, and Appendix. “The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat [or venditor] emptor should not be relied upon to reward fraud and deception * * * practices contrary to decent business standards,” *FEDERAL TRADE COMMISSION v. STANDARD EDUCATION SOCIETY*, 58 S. Ct. 113 (1937) at 115.

If the granger laws—and the Milk Control Board Law—prevented a commodity from being taken out of the state, the cases would be different. Such prohibition is obviously a barrier to trade, especially where the legislature has the purpose to retain resources for the benefit of the inhabitants of its state; the Constitution was never intended to permit one group of citizens selfishly to get such advantage over another merely by virtue of state boundaries: *WEST v. KANSAS NATURAL GAS CO.*, 221 U. S. 229 (1911); *PENNSYLVANIA v. WEST VIRGINIA*, 262 U. S. 553 (1922).

The attitude of the Court is quite different where such conservation statutes are not prohibitory, but rather regulatory: *THOMPSON v. CONSOLIDATED GAS UTIL. CORP.*, 300 U. S. 55 (1937); *CHAMPLIN REFINING CO. v. CORPORATION COMMISSION*, 286 U. S. 210 (1932); the Indiana decision of *JAMIESON v. INDIANA, ETC. CO.* approved in *WEST v. KANSAS NATURAL GAS CO.*, 221 U. S. 229 (1911) at 257.

However, instead of being purposed to retain, and retaining, grain or milk for the inhabitants of the state (thus prohibiting commerce), the granger laws and the Milk Control Board Law are purposed to, and do, promote sales in honest commerce. Laws with such effect are sustained even where prohibitory (rather than regulatory) as in *SLIGH v. KIRKWOOD*, 237 U. S. 52 (1915):

A statute of the state of Florida undertakes to make it unlawful for any one to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which are immature or otherwise unfit for consumption.

* * * * *

That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the state, even in the just exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; while this is true, this court from the beginning has recognized that there may be legitimate action by the state in the matter of local regulation, which the state may take until Congress exercises its authority upon the subject. This subject has been so frequently dealt with in decisions of this court that an extended review of the authorities is unnecessary. See the *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729.

While this proposition seems to be conceded, and the competency of the state to provide local measures in the interest of the safety and welfare of the people is not doubted, although such regulations incidentally and indirectly involve interstate commerce, the contention is that this statute is not a legitimate exercise of the police power, as it has the effect to protect the health of people in other states who may receive the fruits from Florida in a condition unfit for consumption; and however commendable it may be to protect the health of such foreign peoples, such purpose is not within the police power of the state.

The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the state, whether in their public or private relations, whether it related to the rights of

persons or property of the public or any individual within the state. *New York v. Miln*, 11 Pet. 102, 139, 9 L. ed. 648, 662. The police power, in its broadest sense, includes all legislation and almost every function of civil government. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. *Camfield v. United States*, 167 U. S. 518, 524, 42 L. ed. 260, 262, 17 Sup. Ct. Rep. 864. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health * * *.

Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state. * * *

We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the state. The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose.

* * * * *

* * * Therefore until Congress does legislate upon the subject, the state is free to enter the field. *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

Instead of constituting such prohibition upon exportation, the granger laws and the present law are merely reasonable police regulations thereof (in instances where the Federal Government has not acted). Such regulations do not barricade trade, but facilitate it. It is so held whether the producer protected is the one in the importing state who buys therein, as in *PATAPSCO GUANO Co. v. BOARD OF AGRICULTURE*, 171 U. S. 345 (1898) and *NATIONAL FERTILIZER ASSN. v. BRADLEY*, 301 U. S. 178 (1937) (fertilizer cases); or the one in the exporting state who sells therein, as in the case at bar, *NEW MEXICO v. DENVER & RIO GRANDE R. Co.*, 203 U. S. 38 (1905), and *SLIGH v. KIRKWOOD*, *supra*.

The cases are legion where the legislative purpose is to protect the health of the public from diseased commodities: *MINTZ v. BALDWIN*, 289 U. S. 346 (1933). But the law is no different where the commodity is wholesome and merely deceptively inferior: *HEBE Co. v. SHAW*, 248 U. S. 297 (1919). In fact, the law is the same even where the commodity is totally unrelated to health, but merely susceptible of fraud and imposition: *PURE OIL COMPANY v. STATE OF MINNESOTA*, 248 U. S. 158 (1918); *HALL v. GEIGER-JONES Co.* 242 U. S. 539 (1917); and the fertilizer cases, *supra*. Similarly, where no commodity is involved, but where nevertheless the statute is designed to prevent fraud and imposition; *MAYOR ETC. OF NEW YORK v. MILN*, 11 Pet. 102, 9 L. ed. 648 (1837).

All of the foregoing cases require adherence to certain standards in the producing, buying, selling or delivering of an article of commerce, which standards may attach either to the article itself, or to the conduct of the dealer therein; and this whether importation or exportation. A few fall within the state laws commonly sustained as "inspection"¹² or "quarantine" measures. But here again there is no magic in words, because, even in each case where the law was sustained, it "in its practical workings necessitates State treatment of phases of interstate commerce" nevertheless: FRANKFURTER AND LANDIS, *THE COMPACT CLAUSE OF THE CONSTITUTION*, 34 *Yale Law J.* (1925) 724. The important thing is that applying our practical test, in none of these cases is commerce from one state barricaded by another; rather it is encouraged. On the other hand, in the cases where a barrier was created, particularly by an importing state, the law was stricken down. It is submitted that no barricade exists in the granger cases or in the instant case.

B. THE STATUTE DOES NOT OTHERWISE DISCRIMINATE AGAINST INTERSTATE COMMERCE.

Does compliance with the present statute erect an unconstitutional barrier against interstate commerce in any manner not hitherto discussed? There is no indication that the cost, or other regulation, exceeds that in the granger cases; and certainly no evidence that the cost or other regulation is excessive. There are three (3) main items involved in the present case:

¹² In many aspects, the present law is an inspection law, particularly regarding the examination of books and records to verify that producers are correctly paid: Sections 8, 15, 16.

1. **LICENSE:** The license fees are merely contributions, varying with the size of the dealer, toward a special fund (section 17) for administering the statute. It is a costly task, for example, to examine the records of over 1,000 dealers to ascertain that nearly 80,000 milk producers are being paid accurately and promptly for 4 billion pounds of milk annually; Cowden and Fouse, *supra*, note 11, tables 4, 6. Under such circumstances a reasonable fee never violates the interstate commerce clause: *PURE OIL COMPANY v. STATE OF MINNESOTA*, 248 U. S. 158 (1918) and the many citations therein. Interestingly enough the defendant herein is assessed a fee of zero dollars, because Section 11-E¹² of the statute permits deduction of his entire supply, shipped to New York. The law certainly is not a revenue law; compare *CHASSANIOU v. GREENWOOD*, 291 U. S. 584 (1934).

It should be especially noted that the requirement of a license herein is to be judged by the principles above, applicable to police regulations. If the requirement were imposed solely by virtue of non-residence, having no other purpose, the result would be different, as in *DAHNKE-WALKER MILLING CO. v. BONDURANT*, 257 U. S. 282 (1921), where also the corporation had no plant and delivery was made to the carrier.

2. **BOND:** In the first place the law herein merely requires a personal bond, which generally costs nothing. Secondly, even if a corporate surety were required, the state courts have already determined that such bonds are reasonably obtainable; see Appendix

¹² Section 11-E. "Milk sold and distributed outside of this Commonwealth in any state which charges a license fee of milk dealers shall not be included in the determination of the amount of the license fee, provided that such milk is actually computed in determining the amount of such license fee in such other state." * * *

A. Thirdly, the cost of obtaining a bond in compliance with a valid exercise of the state police power does not violate the interstate commerce clause: *ERIE RAILROAD Co. v. BOARD OF PUBLIC UTILITY COMMISSIONERS*, 254 U. S. 394 (1920), quoted *infra*; *MISSOURI PACIFIC RY. Co. v. NORWOOD*, 283 U. S. 239 (1930); see also the *granger cases supra*, and *HARTFORD ACCIDENT AND INDEMNITY Co. v. ILLINOIS*, 298 U. S. 155 (1936).

3. PRICE: According to the agreed statement of the case, the defendant herein would be required to pay producers a higher price for milk under the law than otherwise (R. 15). We are not here dealing with a tax or revenue measure, as in *EUREKA PIPE LINE Co. v. HALLAHAN*, 257 U. S. 265 (1921). Nor is a state here attempting to fix a price for bringing milk from another state, as in *BALDWIN v. SEELIG*, 294 U. S. 511 (1935), discussed *supra*; or persons from another state, as in *COVINGTON & CINC. BRIDGE Co. v. KENTUCKY*, 154 U. S. 204 (1893); these are the clearest instances of one state erecting a barrier against another.

Furthermore, neither is the state fixing a price for milk delivered at the state line or in another state for use in another state, as in *PUBLIC UTILITY COMMISSION v. ATTLEBORO STEAM & ELEC. Co.*, 273 U. S. 83 (1927) (electricity); see also *HIGHLAND FARMS DAIRY INC. v. AGNEW*, 300 U. S. 608 (1937) at 616. In the present case the state is simply fixing the price of milk produced, sold and delivered by producers in the state to the defendant, a dealer with an established place of business also in the state; if he must pay a higher sum for the raw product, it increases his cost of doing

business within the state, just as where a higher sum was required to be paid for labor within the state in *MISSOURI PACIFIC RY. Co. v. NORWOOD*, 283 U. S. 239 (1930); and for abolishing grade crossings within the state in *ERIE RAILROAD Co. v. BOARD OF PUBLIC UTILITY COMMISSIONERS*, 254 U. S. 394 (1920), quoted below. In the present case, there is little danger of a trade barrier being erected, because if the price of milk is prescribed too high the local plants of interstate dealers will be driven out of the state and our own Pennsylvania farmers will lose their market. In any event, nothing could be clearer than the following vivid statement of the law in the Erie (*supra*) case:

* * * That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & R. G. R. Co. v. Denver*, 250 U. S. 241, 246, 63 L. ed 958, 962, 39 Sup. Ct. Rep. 450. * * *

Of course, the Milk Control Board may some day issue some order or regulation involving the defendant, which may have the effect of violating the interstate commerce clause; or it may be that some statutory provision hitherto not invoked against the defendant will be inconsistent with the clause. But this is a question which can be presented some future day. In *CARGILL COMPANY v. STATE OF MINNESOTA*, 180 U. S. 452 (1901) it was held:

* * * A license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and the valid rules and regulations prescribed by the commission. If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings. * * *

The Court observed (465) : "There are, perhaps, provisions in the act which it would be unconstitutional to apply" to the defendant, "But these matters need not be considered at this time." To the same effect see *HIGHLAND FARMS DAIRY INC. v. AGNEW*, 300 U. S. 608 (1937).

Perplexing problems of administration may arise, but even the most extreme can be met when and if they confront the board or the courts: *LONE STAR GAS CO. v. TEXAS*, 82 L. ed. 884 (1938).

Having submitted that the statute herein presents no barrier to commerce between the states, it is next necessary to inquire whether there is any other discrimination against such commerce. A negative answer is apparent from the Agreed Statement of Case (R. 13), which points out (Paragraph 12, R. 14) that over 4 billion pounds of milk **within** Pennsylvania is subject to the present statute, as well as the defendant's supply. According to the recent survey de-

scribed above, 90.3% of all milk handled by Pennsylvania dealers was either purchased from producers (82.2%) or produced by the dealers' own herds (8.1%); and only 15% of all milk handled from all sources is exported; see Cowden and Fouse, *supra*, note 6, Tables 4, 47. However, even if all the milk were exported, the statute would not necessarily be regarded as discriminatory: *TOWNSEND v. YEOMANS*, 301 U. S. 447 (1936); because it is designed to, and does, affect **all** commerce in milk, regardless of where the chips fall: *SOUTH CAROLINA v. BARNWELL BROS.*, 303 U. S. 177 (1938).

Thus, the present statutory provisions are quite different from the requirement in *BALDWIN v. SEELIG*, 294 U. S. 511 (1935), which expressly applied solely to "milk produced **outside of the State**" (footnote 1, at 519); see discussion above, page 27. This statutory requirement was amended out of the previous Pennsylvania law by section 18-G of the present statute. Furthermore, the present case is quite different from *DI SANTO v. PENNSYLVANIA*, 273 U. S. 34 (1927) wherein the statute applied **solely** to steamship tickets for **foreign commerce**; this case is further discussed below.

It is respectfully submitted that by virtue of the nature of the dairy industry, and the purpose and effect of the present statute with respect thereto, its application to the defendant does not create a barrier or otherwise discriminate against interstate commerce; that, under all the authorities, the law is consistent with the interstate commerce clause; that therefore it remains effective until superseded by valid Federal regulation.

C. THE OPINIONS BELOW: CASES DISTINGUISHED

The opinions of the courts below are based upon the following decisions of this Court: *LEMKE v. FARMERS GRAIN Co.*, 258 U. S. 50 (1922); *SHAFFER v. FARMERS GRAIN Co.*, 268 U. S. 189 (1925); and *DI SANTO v. PENNSYLVANIA*, 273 U. S. 34 (1927).

The Lemke and Shafer cases are the only granger cases not earlier discussed herein. Let us now apply to these cases the tests described above, page 14.

In *LEMKE v. FARMERS GRAIN Co.*, 258 U. S. 50 (1922) the opinion of this Court pointed out that, "The grain can only be purchased subject to the power of the state grain inspector to determine the margin of profit which the buyer shall realize upon his purchase." "Margin of profit" was defined to be "the difference between the price paid at the North Dakota elevator and the market price, with an allowance for freight, at the **Minnesota** points to which the grain is shipped and sold" (57).

No standard whatever was prescribed whereby the state officer could determine the reasonableness of the margin which was to be permitted; no provision was made that a fair return be allowed upon the volume of business handled in terms of dollars, or upon the value of property used and useful, or upon any other basis. On the other hand, an extra-state market, and an extra-state price was the only express requirement to be considered in the determination of reasonable margins. Hence there was no holding to the effect that the State of North Dakota had enacted a statute with-

in the valid exercise of the state police power. The case turned entirely upon the holding that the statute "enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce" (59). This much is certain: the North Dakota statute authorized a state officer to perform the legislative function of rate making, delegating to him the power so to do in a manner which violated due process (failing to meet the first test), and prescribing extra-state factors as the **only** standard for him to consider (failing to meet the second test). It is not surprising that the majority of this Court determined the statute therein to be violative of the interstate commerce clause.

The dissenting opinion held that the statute was at least in part a proper exercise of the state police power; that it was severable; and that therefore the interstate commerce clause was not violated, regardless of "whether the purchases involved in this case were intra-state or inter-state commerce" (64).

So far as concerns the licensing and other provisions of the North Dakota statute, the majority of the Court held that without the price-fixing provisions "the state legislature would not have passed the act" (60), and therefore set aside the entire statute. This conclusion cannot be reached in the case at bar because Section 22 of the Milk Control Law of 1935, and Section 1201 of the Milk Control Law of 1937 (which repealed and reenacted the former) express the clear intention of the legislature that the provisions thereof are severable. Hence, both opinions in the Lemke case are,

at the very least, authority for the (1) licensing, and (2) bonding provisions of the case at bar.

It is submitted that *Lemke v. Farmers Grain Co.* was correctly decided as to result upon the price requirement. This is strongly intimated in a unanimous decision of this court: *TOWNSEND v. YEOMANS*, 301 U. S. 441 (1937). The latter case distinguished the former solely by pointing out the definition of margin or profit, and holding that therein "the state officer was thus authorized to 'fix and determine the price' to be paid for grain which was '**bought**, shipped, and **sold** in interstate commerce'. That the provision was a regulation of interstate commerce was said to be 'obvious from its mere statement' " (458); it has already been pointed out that the *Lemke* case required price-fixing "at the Minnesota [extra-state] points to which the grain is shipped and sold". This Court has determined time and again that such regulation of extra-state business has an effect upon persons beyond the (legislating) state which tends toward the trade barriers condemned by the framers of the Constitution: *HIGHLANDS FARMS DAIRY INC. v. AGNEW*, 300 U. S. 608 (1936); *BALDWIN v. SEELIG*, 294 U. S. 511 (1935); *PUBLIC UTILITY COMMISSION v. ATTLEBORO STEAM & ELEC. Co.*, 273 U. S. 83 (1927); *COVINGTON & CINC. BRIDGE Co. v. KENTUCKY*, 154 U. S. 204 (1893). In the case at bar we are not regulating the defendant's dealings with extra-state persons, but rather his dealings with the producers selling to him in the same state where they, the legislature, he and his plant are situated.

SHAFFER v. FARMERS GRAIN CO., 268 U. S. 189 (1925) held invalid a later statute of the State of North Dakota, which excluded the price-fixing provision of the former law held invalid in the *Lemke* case. The majority opinion of the Court contains the following passage in the *Shafer* case, at 200:

That it is designed to reach and cover buying for interstate shipment is not only plain but conceded.

This certainly is not conceded by your petitioner in the case at bar: see argument *supra*. Another vital difference between the two cases lies in the fact that **Congress had already occupied the field** sought to be controlled by the North Dakota legislature. In fact, the two fields were so identical that the state contended in the *Shafer* case that this statute was merely an inspection regulation "to assist in carrying out the purposes of the United States Grain Standards Act" (202). However, this Court determined that, "We find little in the said act to support, and much to refute, the assertion that it is merely an attempt to carry out the purposes of the federal act" (203). In fact, *Gavit, INTERSTATE COMMERCE* (1932), 244, 261, interprets this case as having turned upon the fact that Congress had occupied the field (although one cannot deny that the opinion adheres to the logic expressed in the *Lemke* case). It is certain that this Court was shocked by a state statute which added to prior regulation imposed upon an industry by Congress; and, as was said in *SOUTH CAROLINA v. BARNWELL BROS.*, 303 U. S. 177 (1938) (footnote 4) "an unnecessarily harsh restriction" will be held unconstitutional. Such double regulation does not appear in the present case. Such regulation is, indeed, a trade barrier.

If any other view were taken with regard to the Lemke and Shafer cases, they would conflict with *MUNN v. ILLINOIS*, *supra*, and the other granger cases. Then it would become pertinent to reiterate that *TOWNSEND v. YEOMANS*, 301 U. S. 441 (1937) discussed, approved and followed the latter cases quite recently, and merely "distinguished" the former.

The Supreme Court of Pennsylvania held that the instant case was controlled by *DI SANTO v. PENNSYLVANIA*, 273 U. S. 34 (1927). However, this case merely involved the validity of a statute requiring licenses to sell steamship tickets **to or from foreign countries**. This necessarily involved regulation of foreign commerce and foreign commerce only, the type of discriminatory legislation condemned by this Court as recently as *SOUTH CAROLINA v. BARNWELL BROS.*, *supra*; the barrier thus created is identical to that in *COVINGTON & CINC. BRIDGE CO., v. KENTUCKY*, (and other cases, *supra*, pages 12, 53) wherein was condemned a statute fixing bridge tolls to and from another state.

It is interesting to observe that the majority opinion in the Di Santo case also relies upon *SHAFFER v. FARMERS' GRAIN CO.*, 268 U. S. 189 (1924), wherein the opinion shows that counsel expressly "conceded" that the statute was "designed" to affect interstate commerce. This case is more fully distinguished above.

The majority opinion in the Di Santo case held that it was controlled by *TEXAS TRANSPORT & TERMINAL CO. v. NEW ORLEANS*, 264 U. S. 150 (1924), and *MCCALL v. CALIFORNIA*, 136 U. S. 104 (1889), yet both of the latter

cases were tax cases, wherein appears not the slightest discussion of State police power.

In the case at bar the legislation constitutes no effort to regulate only milk dealers in interstate commerce; therefore it is entirely distinguishable from the Di Santo case. Furthermore, in the case at bar it has never been contended that the license fee constitutes a tax, and it in fact is not a revenue producing measure (see page 46, *supra*); therefore it is entirely distinguishable from the Texas Transport and McCall cases.

It is also pertinent to note that the evils to be remedied in the Di Santo case were, in a sense, national in scope: ignorant foreigners, susceptible to fleecing by dealers in foreign steamship tickets, are no less susceptible because they are in one state rather than another. Furthermore, enforcement of such laws would often involve dealing with foreign governments, a matter of national concern. In the present case, however, the relation of producer to dealer depends entirely on the nature of the industry in the particular resale market or production area, and may vary with the business cycle, the amount of rainfall, the distance from market, or the plane of business practice in the community. Indeed, the Di Santo problem differs from the milk problem because the latter (1) is local in the sense that it invites and necessitates diversity of treatment; and (2) involves a business "affected with a public interest."

The Di Santo case must be limited to its specific facts as a foreign commerce barrier, in view of the

many cases sustaining (1) licensing, and (2) bonding, which affect interstate commerce. Many such licensing and permit cases have already been cited, entirely aside from the Granger cases. These may be designed to protect the safety of the public, as in *SMITH v. ALABAMA*, 124 U. S. 465 (1888); or their right to freedom from fraud and imposition, as in *NATIONAL FERTILIZER ASSOCIATION v. BRADLEY*, 301 U. S. 178 (1937). Call these "inspection" laws, as one may: so is the present law, which subjects the books and records of milk dealers to examination for determining whether producers are fully paid, and paid promptly, for all the milk they deliver as properly weighed, graded, tested and classified according to use; see Appendix A, page 74; and *supra*, page 21.

If persons may be so licensed by law, then they can also be bonded as a means of enforcing the law. Of what other purpose could the bond be? *HARTFORD ACCIDENT AND INDEMNITY CO. v. ILLINOIS*, 298 U. S. 135 (1936) (bonding of produce dealers) speaks volumes in support of the fact that the Di Santo decision is not conclusive of the bonding requirement herein. True, in the Hartford case the bond was required by the importing state rather than the exporting (as here) state. But this can make no difference, if bonding constitutes a trade barrier: compare *PATAPSCO GUANO CO. v. BOARD OF AGRICULTURE*, 171 U. S. 345 (1898) with *NEW MEXICO v. DENVER & RIO GRANDE R. CO.*, 203 U. S. 38 (1906); these are permit cases applied to imports and exports, respectively (fertilizers and hides), and the law could be no different respecting bonds designed to make such permit laws enforceable. The important thing is that both Illinois (the Hartford case) and

Pennsylvania (the instant case) are requiring bonds of persons in their own state, and not of persons in other states; nor do the laws expressly operate solely upon a commodity inextricably part of foreign commerce (*Di Santo* case): and in both instances honest commerce is promoted, as in the granger cases. Furthermore, the *Hartford* case (where the dealer imported) was recently cited as authority in the unanimous decision of *TOWNSEND v. YEOMANS*, *supra* (where the warehouseman exported).

It is submitted that the instant case is controlled not by the *Di Santo* decision (and by those cases to which it is based), but rather by *MUNN v. ILLINOIS* and the line of authorities succeeding it.

If the Supreme Court of Pennsylvania correctly relied upon *DI SANTO v. PENNSYLVANIA*, 273 U. S. 34 (1927), it is respectfully submitted that reconsideration thereof by this Court at this time is necessary and desirable from a legal, social and economic point of view. It was decided by a divided court, Mr. Justice Brandeis, Mr. Justice Stone and the late Mr. Justice Holmes dissenting. The opinion of the majority was in turn based upon tax cases decided by a divided court, including *MCCALL v. CALIFORNIA*, 136 U. S. 104 (1889), of which Mr. Justice Brandeis, dissenting, asked "disregard" because this "would involve merely refusal to repeat an error once made" (273 U. S. 34, at 41). In *Di Santo v. Pennsylvania*, *supra*, this Court reversed the Supreme Court of Pennsylvania, the opinion of which appears in 285 Pa. 1 (1923); and yet in the instant case the Supreme Court of Pennsylvania reasserts belief in its original opinion, stating, "We

have felt, and still feel that" the present type of police regulation is "peculiarly within the State's domain."

Since the decision of this Court in the *Di Santo* case, many changes have taken place. There has come a recognition that the lives of the citizens of the United States are not limited by the boundaries of the States wherein they reside; that activities in one State often necessarily affect activities in another. Especially is this true in the milk industry, wherein milksheds have developed according to natural markets rather than according to State lines. Yet the problem is not national in scope because every milkshed has its own problems. In the few years since the decision of the above case, a pronounced change has occurred in the fields of legal and social thought, arising from the recognition that many problems of human endeavor cannot be aided or solved except by action which accepts that State lines must be crossed. Is the only alternative intervention by the Federal Government? Under the *Di Santo* case the answer is apparently in the affirmative, even with respect to licensing and bonding. But under *MUNN v. ILLINOIS* and its succeeding cases, including the *Hartford* case, the answer is clearly that the State may act until Congress see fit.

It is submitted that the realities of trade under to-day's conditions compel the conclusion that, unless restricted to the peculiar facts, the result of the *Di Santo* case was unsound particularly as applied to business affected with a public interest.

IV. The Statutory Requirements Herein Have Not Been Superseded by Federal Regulation.

(1) Licensing; (2) Bonding: Congress has not required or authorized licensing or bonding of milk dealers, though it has imposed such requirements upon dealers in fresh fruit and vegetables (Act of June 10, 1930, c. 436, 46 Stat. 541, as amended; 7 U. S. C. A. Sec. 499); upon motor carriers (Act of Aug. 9, 1935, c. 498, 49 Stat. 543; 49 U. S. C. A. Sec. 302); and many others.

(3) Price: So far as concerns the price of milk handled in interstate commerce, the Congress has authorized regulation by the Secretary of Agriculture in his discretion regarding certain milk under restricted circumstances, and where certain facts existed. (Act of Aug. 24, 1935, c. 641, 49 Stat. 753, as amended; 7 U. S. C. A. sec. 601). The need for such federal price regulation was impressed upon the entire nation by the consequences which followed in the wake of *Baldwin v. Seelig*, *supra*. A dramatic sequel thereto is the petition¹⁴ addressed to the United States Department of Agriculture by seven State governments in 1935, seeking federal price regulation to take the place of the state price control (milk moving into the legislating state) invalidated by the Baldwin decision.

That Congress has power to regulate the price of goods handled in interstate commerce is manifest in *CARTER v. CARTER COAL CO.*, 298 U. S. 238 (1936) (opinions by Mr. Chief Justice Hughes, at 319; and by Mr. Justice Cardozo, at 326). Such power was recognized by the unanimous view of this Court in *BALDWIN v.*

¹⁴ See Appendix B.

SEELIG, 294 U. S. 511 (1935) at 522, to the effect that the interference with commerce therein at issue was "meant to be averted by subjecting commerce between the states to the power of the nation"; and by both opinions of this Court in *PUBLIC UTILITY COMMISSION v. ATTLEBORO STEAM & ELEC. Co.*, 273 U. S. 83 (1927) wherein the majority held that rate regulation (of electricity moving across state lines) can "be attained by the exercise of the power vested in Congress" (at 90).

There certainly is no doubt that "The question of price dominates trade between the states," as this Court recognized in *CHICAGO BOARD OF TRADE v. OLSEN*, 262 U. S. 1 (1923), at 40. As long ago as *MUNN v. ILLINOIS*, 94 U. S. 113 (1876) the right of Congress to act (if it saw fit to do so) was never doubted. This Court held, at 134: "The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied." Since Congress has the right to regulate interstate commerce the above authorities properly hold that it also has the right to establish charges therein. See also *UNITED STATES v. BUTTRICK Co.*, 91 F. 2d 66 (1937).

The price of milk moving in interstate commerce is much more closely related to such commerce than the price of storage space or services in the handling, within a state, of the cows which produce such milk: *TAGG BROS. & MOOREHEAD v. UNITED STATES*, 280 U. S. 420 (1930); *ACKER v. UNITED STATES*, 298 U. S. 426 (1936). Similarly the price of milk moving in interstate commerce is more closely related to such commerce than

the labor, within a state, in handling it: NATIONAL LABOR RELATIONS BOARD *v.* JONES & LAUGHLIN STEEL CORP., 301 U. S. 1 (1937).

However, the record in the case at bar does not show any exercise of authority by the Secretary of Agriculture pursuant to the Act of August 24, 1935, c. 641, 49 Stat. 753, as amended (7 U. S. C. A. Sec. 601) either affecting the defendant or any part of the milk purchased by it. Furthermore, Congress has expressly directed the Secretary to **cooperate** with state authorities in the "formulation, administration, and enforcement of Federal and State programs": Act of 1935, *supra*, as amended June 3, 1937, c. 296, Sec. 1, 50 Stat. 246 (7 U. S. C. A. Sec. 610). Where there is such intention to cooperate with rather than to supersede state authorities, state regulation is not superseded: HARTFORD ACCIDENT & INDEMNITY CO. *v.* ILLINOIS, 298 U. S. 155 (1936); MERCHANTS EXCHANGE *v.* MISSOURI, 248 U. S. 365 (1919), in absence of actual conflict.

CONCLUSION

If the decision of the court below is the law of the land, the stabilization of the milk industry of the United States by means of milk control legislation and all commerce in milk will be greatly hindered. At least twenty States (practically all the dairy States) today have upon their statute books legislation of the necessary type involved in the instant case. Milk dealers in any State may evade all regulation by simply purchasing their milk at plants which they erect in other States, thus creating an area without law, to the detriment of dairy farmers, other dealers and the consuming public.

It is a matter of common knowledge that milk dealers with no assets in the State are able to, and do, in accordance with the custom of the trade, buy their milk on credit; if required to post neither license nor bond they would indeed have the farmers "at their mercy:" *ROHRER v. MILK CONTROL BOARD*, 322 Pa. 257 (1936), at 265. Hence it is most essential here to reiterate that the provisions of the statute at issue in this case are severable.

As stated above, only a small amount of the milk produced in Pennsylvania is shipped to other States; yet it is common knowledge that the malpractices of a minority can disrupt an entire industry. It is impossible to maintain fair dealings in an industry within a State for the benefit of the inhabitants of the State, if here and there a milk dealer can create an area without law merely because he ultimately resells the milk in some other State. (No attempt has been made to apply the present statute to any resales by the defendant). Such "no-man's-land" is increasing in area, not only within the Commonwealth of Pennsylvania but within all other States with milk control legislation, as milk dealers come more and more to realize that by crossing a State line they can evade all regulation, at least until the Federal Government sees fit to act, and thereby break down the price structure and the business standards within both States.

It is important to note that if the position of your petitioner is sustained by this Court it will be possible for the twenty States with milk control legislation to perfect a veritable network in their stabilization efforts, because the State in which the milk is both pro-

duced and purchased will have jurisdiction to regulate with respect to dealers therein.

It is respectfully submitted that the Supreme Court of Pennsylvania erred in failing to base its decision upon cases of this Court squarely sustaining your petitioner in the instant case; that the decisions of this Court relied upon by the Supreme Court of Pennsylvania are distinguishable, especially in view of the trend of judicial thought arising out of changed economic conditions; that the position of the court below is detrimental to the dairy industry of the United States; and that therefore the decree of the court below should be reversed.

Respectfully submitted,

GUY K. BARD,

Attorney General

HARRY POLIKOFF,

Deputy Attorney General

Counsel for Petitioner.

APPENDIX A

(JUDICIAL FINDINGS SUSTAINING LEGISLATIVE FINDINGS,
DESCRIBING DAIRY INDUSTRY OF PENNSYLVANIA;
REFERRED TO PARTICULARLY AT PAGE 19.)

Harrisburg Dairies, Inc., a Pennsyl-
vania corporation

v.

Howard G. Eisaman, John J.
Snyder, and Robert E. Pattison,
Constituting the Milk Control
Commission of the Commonwealth
of Pennsylvania

In the Court of Common Pleas of
Dauphin County

Sitting in Equity

No. 1261 Equity Docket

No. 183 Commonwealth Docket 1937

OPINION

BY THE CHANCELLOR:

* * * * *

This case came on to be heard and testimony was
taken from which we find the following:

FACTS

1. Milk is the most necessary human food, vital
for promotion of the public health and for development
of strength and vigor in the race.

2. Milk is a most fertile field for the growth of
bacteria, and therefore its production and distribution
have been surrounded by more costly sanitary require-
ments than those of any other commodity.

3. Milk consumers are not assured of a constant
and sufficient supply of pure, wholesome milk unless
the high cost of maintaining sanitary conditions of
production and standards of purity is returned to the
producers of milk.

4. The Milk Control Commission fixes the price of milk, and bonding of dealers conditioned on paying producers tends to assure payment of the fixed price.

5. A milk producer is required to sell his milk on credit, the term of which is generally not less than one month, and is usually one month to six weeks.

6. This credit period is caused by the fact that milk is sold on a utilization, classified and complicated price basis.

7. The statutory requirement that milk dealers file bonds is related to protection and promotion of the adequacy of the milk supply and the sanitary quality thereof.

8. Milk producers must make delivery of their highly perishable commodity immediately after it is produced, and must generally accept any market at any price.

9. Under the utilization method of payment prevailing in the milk industry, particularly in cities, the value of a producer's market is unknown until the milk dealer sells the fluid milk and uses or disposes of the surplus.

10. Only dealers have facilities for accurately weighing and testing milk; and knowledge of weights, tests and uses is in the exclusive possession of the dealers who, due to error, carelessness or fraud, may report same incorrectly, causing losses to producers.

11. The producers' lack of control over their market is aggravated by the trade custom of dealers in paying weeks after delivery, which custom is recognized by the Milk Control Commission because of the necessity that milk be used before the amount to be paid can be known; and this custom keeps producers obligated to continue delivery in order to receive payment for previous sales, and permits dealers to operate on the producers' capital without giving security therefor.

12. Milk producers are subject to fraud and imposition, and do not possess the freedom of contract necessary for the procuring of cost of production; they suffer substantial losses, and, in the absence of governmental regulation of milk, would suffer still more.

13. The milk industry is a paramount industry upon which the health and welfare of the Commonwealth of Pennsylvania largely depends.

14. Dishonest and irresponsible milk dealers have defrauded producers and imposed on them by making erroneous calculations of the prices to which farmers are entitled under the complicated pricing formulas used in the industry.

15. Bonding will tend to eliminate dishonest and irresponsible dealers, since they will have difficulty obtaining bonds.

16. Bonding will tend to keep honest dealers from becoming dishonest because the dealer knows that he

must pay the proper price either directly or through his bond and also because bonding has a tendency to prevent a dealer from getting into financial difficulty which drives him into dishonesty.

17. By reason of the producers' lack of contact with their dealers due to living many miles distant from the dealers' place of business, most producers are unable to investigate the dealers' financial condition or reputation for honesty and are the last of the dealers' creditors to discover their financial difficulty or dishonesty and to be paid in case thereof; for this reason producers need the credit protection bonding gives them.

18. Loss to milk producers has been caused by insolvency of honest dealers or by nonpayment by dishonest and irresponsible dealers who buy milk on credit never intending to pay and who move from one group of producers to another.

19. The assurance to a producer, as a result of bonding, that he will be paid for his milk is a definite help in securing satisfactory compliance with sanitary regulations.

20. A milk producer who is not paid currently or who is unpaid for milk is generally unable to buy feed for his cows and his milk suffers in quantity and nutritive quality on this account.

21. Where producers are assured of receiving a fair price for their milk, they can afford to feed costlier high protein feed, in place of natural pasture

and cheaper homegrown grain, and are able to finance a plan of level production of milk throughout the year.

22. Bonding of dealers, conditioned on payment to producers, will force dealers to pay producers the required price and assure the producers that they will receive such price, and thus is related to eliminating unfair competition resulting from failure to pay producers, and surpluses, and to securing a more stable milk supply for the benefit of those portions of the year when there is insufficient.

23. At least 16 companies write the type of corporate surety bond accepted by the Milk Control Commission.

24. Bonds were filed pursuant to the Milk Control Law by 404 milk dealers, or by approximately 40% of all milk dealers subject to the bonding provision of said law, [notwithstanding preliminary injunction relieving them of the necessity so to do].

QUESTIONS INVOLVED

1. Is Article V of the Act of 1937 P. L. 417, in violation of Article I, Sections 1 and 9 of the Constitution of Pennsylvania?

2. Is Article V of said Act in violation of Article III, section 7 of the Constitution of Pennsylvania?

3. Is Article V of said Act in violation of Section 1 of the fourteenth amendment of the Constitution of the United States?

DISCUSSION

* * * * *

The constitutionality of the Milk Control Law which we have under consideration and which has been frequently before the courts, has been established by the Supreme Court and by the Superior Court in the recent decisions of *Milk Control Board v. Eisenberg Farm Products*, 200 Atl. 854; *Commonwealth ex rel. Margiotti v. Ortwein*, 200 Atl. 859; *Colteryahn Sanitary Dairy v. Milk Control Commission*, decided by the Supreme Court June 30, 1938, but not yet reported.

* * * * *

Where an act of the legislature depends for its validity upon the existence of certain facts and circumstances which are denied, the courts may inquire into the existence thereof; *Borden's Company v. Baldwin*, 293 U. S. 194; *Chastleton, Inc. v. Sinclair*, 264 U. S. 543. This we have done and much testimony was taken which formed the basis of our findings of facts in this case.

* * * * *

The facts surrounding the milk industry have been set forth in the preamble to the act under consideration wherein certain legislative findings of facts are made. Thus, we have here not the ordinary preamble discussing broad generalities and purposes, but rather findings of fact which are pointed and significant. The evidence taken upon the final hearing amply sustains and supports these findings to such an extent that it is unnecessary to rely upon the ordinary constitutional presumptions in their favor.

The plaintiff made no effort to dispute that milk is the most necessary human food; therefore the fact will

be accepted as true by this court; and furthermore, milk has already been judicially determined as such in *Carolene Products Co. v. Harter, et al.*, 329 Pa. 49.

Milk is a most fertile field for the growth of bacteria, and therefore its production and distribution have been surrounded by more costly sanitary requirements than those of any other commodity. In this respect witnesses of the plaintiff and defendants were in full accord. Inspectors hired by milk dealers testified to the nature of the sanitary requirements imposed upon milk producers by municipalities and by the Commonwealth. There is no testimony whatever to show that any other agricultural commodity is surrounded by any sanitary requirements whatever; hence the peculiar nature of milk in this regard as explained by the Legislature. That "milk is a fertile medium for the development of bacteria" was accepted as "a matter of common knowledge" in *Dairymen's Sales Asso. v. Public Service Commission*, 115 Pa. Superior Ct. 100, affirmed in 318 Pa. 381.

We think milk consumers are not assured of a constant and sufficient supply of pure, wholesome milk unless the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk. Witness after witness for plaintiffs claimed that milk production is increasing and that the sanitary quality thereof is likewise improving. Both of these contentions were freely admitted by the Commonwealth. That the supply of milk is increasing, however, does not necessarily assure the public an adequate supply thereof. The undisputed testimony is that this increase has merely been in direct proportion to the increase in population. The general trend of

milk consumption, except for temporary variation has been higher and higher. In addition, there are certain seasons of the year when there is a decided shortage of fluid milk in Pennsylvania.

* * * * *

This evidence gives full support to the statement in the Preamble of the Act which reads as follows:

"If milk producers are not paid 'the high cost of maintaining sanitary conditions of production and standards of purity', they supply 'unhealthful milk or milk of lower quality because of financial inability to comply with sanitary requirements and to keep vigilant against contamination.' "

It will be noted that all the testimony of the plaintiff with respect to the improving quality of milk was given by milk dealers and milk dealers' inspectors who insisted that the farmers were paid. The plaintiff entirely overlooked that the Milk Control Law is directed at the evils which result when farmers are not paid. It is obvious that a bond which furnishes collateral security for the payment of cost of sanitary production directly tends to maintain such sanitary production.

We think the relationship of bonding to the supply of milk is two-fold: the supply must be adequate; it must be constant. A. H. Lauterbach testified (N. T. p. 206) if the producers' milk check "gets sufficiently behind he cannot run his milk business." One farmer testified (N. T. p. 265) he only kept his "supply up" "by borrowing money." The relationship of bonding to the adequacy of the milk supply was also explained by Mr. Steele, (N. T. pp. 293, 294.)

There is still another phase to the relationship between bonding and adequacy of supply in that the

large cooperative associations will refuse to sell or will discontinue selling to milk dealers who do not pay or do not promptly pay (N. T. p. 202, 271). In ordinary business this would not affect the public; but in the milk business it is clear that if a milk dealer is deprived of his milk supply for a single day consumers will be deprived of a necessity of life for that day.

The Legislature does not need to wait for a crisis in order to promote the adequacy and purity of the milk supply. It does not need to wait for wholesale financial reverses, bankrupting not only milk dealers but also their farmers. The Legislature can act merely because the threat to milk supply "might become serious" (N. T. p. 222); and certainly it can act when mere delinquency of payment is enough to cause the quality of the supply to degenerate (N. T. pp. 222, 246, 247).

Not a single witness for the plaintiff denied the existence of the relationship between bonding and health. They simply insisted that milk producers are paid and that the supply is increasing (N. T. pp. 24, 96). They did not testify as to the quality or adequacy of the supply of those milk dealers to those milk consumers where the producers are not paid, or not promptly paid. Nor did they testify at all that the supply is sufficient all year 'round; on the contrary, some of plaintiff's own witnesses admitted a shortage at times, during which they had to get some fluid milk and fresh cream from other dealers instead of from producers (N. T. pp. 32, 103).

We conclude from the testimony that bonding is related to the prevention of price cutting (N. T. p. 278); that under the utilization method of payment prevail-

ing in the milk industry, particularly in cities, the value of a producer's market is unknown until the milk dealer sells the fluid milk and uses or disposes of the surplus (N. T. pp. 197-207); that bonding is related to the correct accounting by milk dealers for their utilization of milk (N. T. p. 227); that only dealers have facilities for accurately weighing and testing milk, knowledge of weights, tests and use being in the exclusive possession of the dealers (N. T. pp. 197, 208, 213, 214); that the producers' lack of control over their market is aggravated by the trade custom of dealers in paying weeks after delivery, keeping producers obligated to continue delivery in order to receive payment for previous sales, and permitting dealers to operate on the producers' capital without giving security therefor (N. T. pp. 149, 197, 199, 206); that milk producers are subject to fraud and imposition, and do not possess the freedom of contract necessary for the procuring of cost of production, hence they suffer substantial losses (N. T. pp. 304, 305, 308, 312, 233, 234); and that the milk industry is a paramount industry upon which the health and welfare of the Commonwealth of Pennsylvania largely depends.

We are not impressed with the suggestion of the plaintiff that bonds cannot be procured. At least 10 companies write the type of corporate surety bonds accepted by the Milk Control Commission, and this evidence is undisputed (N. T. pp. 313, 317). Bonds were filed voluntarily, pursuant to the Milk Control Law, by 404 milk dealers, or by approximately 40% of all milk dealers subject to the bonding provision of said law, notwithstanding the preliminary injunction entered (N. T. pp. 303, 314).

We are further of opinion that the bonding requirement of the Milk Control Law does not violate any provision of the State of (sic. or) Federal Constitutions: Milk Control Board v. Eisenberg Farm Products, supra. We think this legislation was enacted for the protection of public health which has always been considered within the proper sphere of state police power. See Carolene Products Co. v. Harter, supra. So far as concerns the public welfare, there is no clearer statement of the law of this Commonwealth than that expressed in Nolan v. Jones, supra. It is not necessary to multiply authorities to establish that the public welfare is a proper police purpose. The facts surrounding the dairy industry are such that the legislative determination of the existence of conditions requiring protection of the public health and welfare, and prevention of fraud, is not arbitrary or capricious. * * *

For the reasons above expressed we reach the following—

CONCLUSIONS OF LAW.

1. The Milk Control Law of 1937 contains express "legislative findings of fact", describing conditions in the dairy industry. Where the record contains merely conflicting evidence, or a debatable question, as to facts found in such manner by the Legislature, the court may not substitute its independent judgment for that of the legislative body; and under such circumstances the legislative determination is deemed conclusive.

2. It is a legitimate exercise of the state police power to enact legislation in furtherance of public health and welfare, and for the prevention of fraud.

3. The facts surrounding the dairy industry are such that the legislative determination of the existence of conditions requiring protection of the public health and welfare, and prevention of fraud, is not arbitrary or capricious.

4. The statutory requirement that milk dealers file bonds under Section 501 of the Milk Control Law is reasonably related to the protection and promotion and purity of the public milk supply, as well as to the promotion of the public welfare.

5. Section 501 of said Milk Control Law does not violate Article I, sections 1 and 9 of the Constitution of Pennsylvania.

6. Section 501 of said Milk Control Law does not violate Article III, section 7 of the Constitution of Pennsylvania.

7. Section 501 of said Milk Control Law does not violate the Fourteenth Amendment of the Constitution of the United States.

And now, September 6, 1938, it is ordered, adjudged and decreed that the plaintiff's bill of complaint is dismissed at its cost, unless exceptions be filed within the time allowed by law.

(Signed) FRANK B. WICKERSHAM

Chancellor.

APPENDIX B

(PETITION OF SEVEN STATES; SEE PAGE 60, NOTE 14)

TO HON. HENRY A. WALLACE
SECRETARY OF AGRICULTURE
WASHINGTON, D. C.

The States of New York, New Jersey, Pennsylvania, Maryland, Massachusetts, Vermont and Connecticut, constituting a natural production and marketing area, acting through duly designated representatives appointed by the Governors of the States in conference assembled, respectfully and urgently petition you as Secretary of Agriculture to exercise the authority conferred under the Act of Congress known as the Agricultural Adjustment Act, amendments thereto and otherwise, to the end that the power therein delegated to the Secretary of Agriculture may be exercised immediately and effectively in cooperation with the exercise of the police power vested in the said sovereign States, in order to correct a condition that threatens the dairy industry and which affects adversely the health and welfare of a large portion of the population of the United States; and

Whereas the production and distribution of milk is a paramount industry in said States; and

Whereas the necessity of assuring an adequate, constant supply of pure and wholesome milk to this large and concentrated part of the population of the country, together with the existence of an economic emergency which has temporarily disturbed the orderly processes

of production and distribution of milk, have led to the enactment of milk control laws in the States of this area; and

Whereas it is a matter of grave concern to the welfare of the nation that these producers living under conditions that make it difficult to develop cohesion and to bargain effectively, be protected in their marketing operations; and

Whereas recent decisions of the Supreme Court of the United States have recognized that the respective States, through their milk control laws, have exclusive jurisdiction over intrastate commerce in milk, and one decision has held in substance that a state is without power to fix the price of milk to be paid a producer outside the state when such milk moves into the state in the channels of interstate commerce; and

Whereas the regulation of the interstate commerce aspect of the milk problem is regarded as emergent and vitally essential to the regulation of the milk industry within this area;

Now, therefore, the signatories hereto representing the several States within the area, respectfully request that you forthwith place such area under federal license so as to include and regulate the operations of all persons trafficking in or transporting milk in the channels of interstate commerce within such area, all to the purpose of securing for all producers an adequate, equitable and reasonable price for the milk sold or used in such area, and that such purpose be achieved, among other ways, by making the prices and price conditions established by the Control Boards

of the respective states applicable to milk moving in interstate commerce into such states.

March 26, 1935

PETER G. TEN EYCK
For the State of New York

WILLIAM B. DURYEE
For the State of New Jersey

HARRY POLIKOFF
For the Commonwealth of Penna.

DAVID G. HARRY
For the State of Maryland

JOSEPH C. CORT
For the Commonwealth of Mass.

EDWARD H. JONES
For the State of Vermont

CHARLES G. MORRIS
For the State of Connecticut

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CHARLES ELMORE GROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 426

**MILK CONTROL BOARD OF THE COMMONWEALTH
OF PENNSYLVANIA,**

Petitioner,

vs.

**EISENBERG FARM PRODUCTS, A PENNSYLVANIA
CORPORATION.**

**BRIEF OF RESPONDENT OPPOSING THE GRANTING
OF A WRIT OF CERTIORARI.**

ROBERT T. FOX,
CARL B. STONER,
✓ THOMAS D. CALDWELL,
MAURICE YOFFEE,
Counsel for Respondent.



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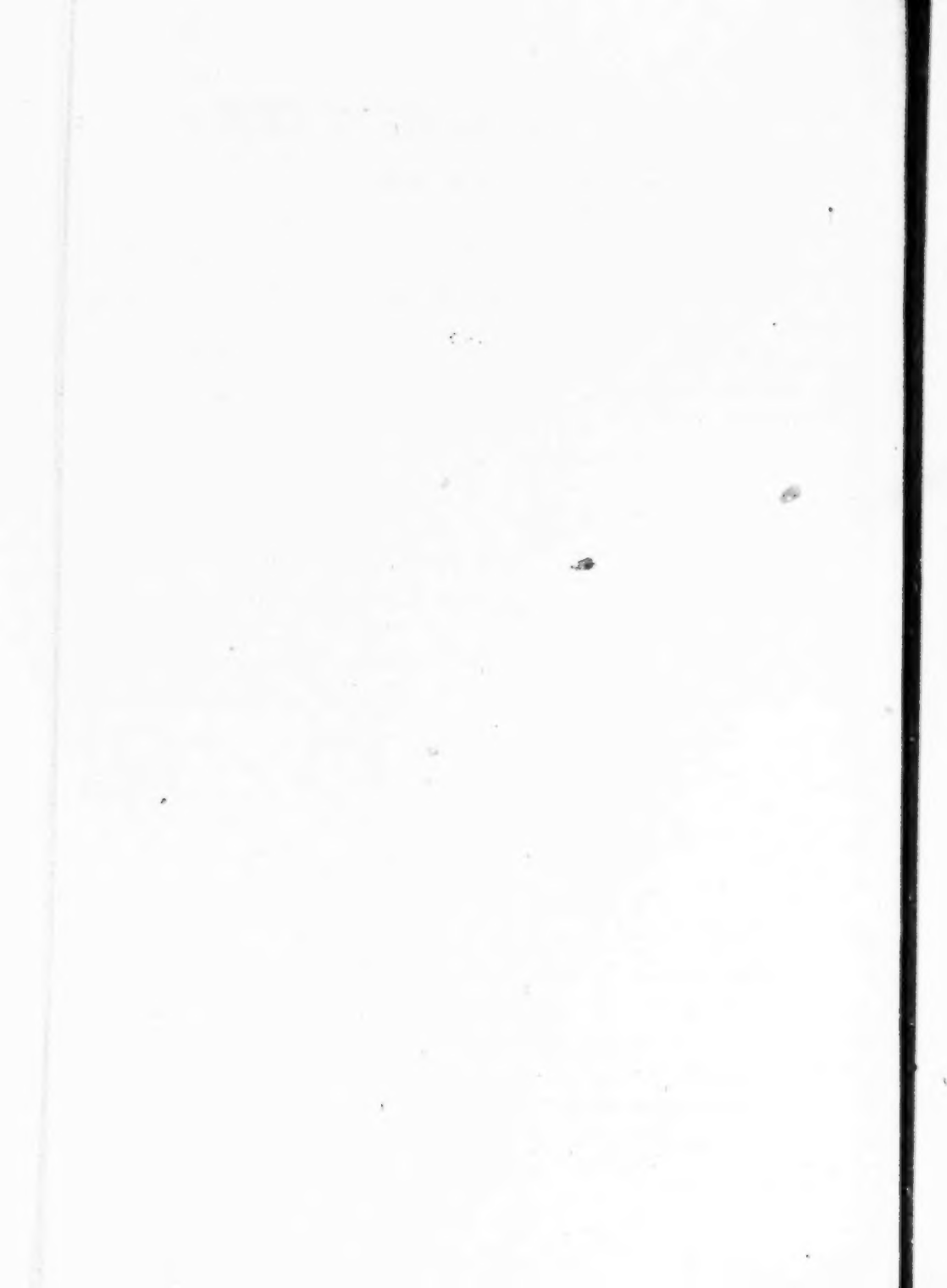
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SUPREME COURT OF THE UNITED STATES

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vs.

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CORPORATION.**

**BRIEF OF RESPONDENT OPPOSING THE GRANTING
OF A WRIT OF CERTIORARI.**

I.

Opinions Below.

The opinion of the Supreme Court of Pennsylvania is reported in 200 Atlantic Reporter 854, and also appears in the record of the present proceedings (R. 32). This opinion, entered June 30, 1938, affirms the decree entered by the Chancellor of the Court of Common Pleas of Dauphin County; the opinions of the latter court are unreported at present; they appear in the record of the present proceedings (R. 15, 26).

II.

Question Presented.

Can the Milk Control Commission of the Commonwealth of Pennsylvania, under the guise of stabilizing the milk industry of this commonwealth, directly burden or regulate milk shipped in interstate commerce?

III.

ARGUMENT.

We present our argument opposing the granting of a writ of certiorari under six points with a discussion under each point.

1.

The Milk Control Commission of the Commonwealth of Pennsylvania cannot, under the guise of stabilizing the milk industry of this commonwealth, directly burden or regulate milk shipped in interstate commerce.

The Milk Control Act shows a comprehensive scheme to regulate the buying and selling of milk. Such purchases can be made only by those who hold licenses from the commonwealth, file bonds and keep certain records. The milk can only be purchased subject to the minimum price established by the Milk Control Commission. That is, under the asserted authority, the Milk Control Commission may fix and determine the price to be paid for milk which is bought, shipped and sold in interstate commerce.

Applying the facts to the statute, it would appear that the statute denies the privilege of engaging in interstate commerce except to dealers licensed by the Commonwealth of Pennsylvania and provides a system which enables the Milk Control Commission to fix the profit which may be made in dealing with the subject of interstate commerce.

It is our contention that even if the regulations are not directed solely against interstate commerce but if the regulations have that effect, they must be declared invalid regardless of the proportion which such commerce bears to the total commerce of the State. If the respondent in the instant case is required to pay the price fixed by the Commission and also to post a bond and pay license fees, the cost of the milk would be increased by the costs of the premium on the bond, plus the license fee, plus the increase in the price ordered by the Commission and the net result would be equivalent to an imposition of a tax on milk destined to another State.

2.

The Farmers Grain Company cases, *DiSanto v. Pennsylvania* and related cases, control the instant case.

The highest court of the Commonwealth of Pennsylvania ruled that the instant case was controlled by the case of *DiSanto v. Pennsylvania*, 273 U. S. 34 (1926). In addition to this authority, we urge upon this Honorable Court that the instant case is likewise controlled by the *Farmers Grain Company* cases, referred to hereafter.

The law as stated in the *DiSanto* case is a consistent statement of the law of the United States Supreme Court. We respectfully submit that if this Honorable Court would have decided the *DiSanto* case otherwise it would have had to reverse all its previous rulings with respect to the authority of a State to pass legislation which directly interferes with or burdens interstate commerce.

Mr. Justice Butler, in writing the opinion in the *DiSanto* case followed the *Farmers Grain Company* cases. Mr. Justice Brandeis filed a dissenting opinion wherein it was stated that the facts in the *DiSanto* case were unlike the facts considered in the *Farmers Grain Company* cases in that the statute in the *DiSanto* case did not affect the price of articles

moving in interstate commerce and that licensing and supervision of dealers in steamship tickets was in essence an inspection law. In other words, Mr. Justice Brandeis distinguished the facts in the *DiSanto* case from the facts in the *Farmers Grain Company* cases and did not intimate that the law in the *Farmers Grain Company* cases was not still the law.

We likewise urge upon this Honorable Court that the statute in the instant case could not be interpreted as an inspection law in view of the separate and distinct inspection laws passed by the Commonwealth of Pennsylvania and referred to hereafter in our brief.

In *Shafer v. Farmers Grain Company*, 268 U. S. 189 (1924), the North Dakota Statute provided, among other things, that every buyer operating a public grain elevator must obtain a yearly license, the fee for which was to be adjusted to the capacity of the elevator, and required those operators who do not pay cash in advance to file with the supervisor a sufficient bond to secure payment for all wheat bought on credit and to keep records of all purchases.

The statute also required the State supervisor to investigate and supervise the marketing of grain for the purpose of preventing various things which were deemed unjust and fraudulent and authorized him to make rules and regulations to carry out the provisions of the act.

This Honorable Court, at page 201, held:

"We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the Act directly interferes with and burdens interstate commerce, and is an attempt by the State to prescribe rules under which an important part of such commerce shall be conducted. *This no state can do consistently with the commerce clause.*" (Emphasis-ours.)

The regulation sought to be imposed in the instant case is very similar to the regulation sought to be imposed in *Lemke v. Farmers Grain Company*, 258 U. S. 50 (1921). In that case the Act provided that purchases of grain could be made only by those who held licenses from the State, pay State charges for the same, and act under a system of grading, etc., defined in the Act, and that grain could only be purchased subject to the power of the inspector to determine the margin of profit which the buyer should realize upon his purchase.

There, after outlining the control to be exercised under the State Act, this Honorable Court held:

“That is, the state officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. That this is a regulation of interstate commerce, is obvious from its mere statement.”

In *Baldwin v. Seelig*, 294 U. S. 511 (1935), the Statute in New York attempted to regulate the price of milk to be paid in Vermont for shipment into New York. Without questioning the fact that the transaction was one in interstate commerce, the late Mr. Justice Cardozo in delivering the opinion of this Court, said:

“Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if custom duties, equal to the price differential, had been laid upon the thing transported * * * . *‘It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.’*”

“Milk may be excluded if necessary safeguards have been omitted; but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level

of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. * * * Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states. Cf. *Asbell v. Kansas*, 209 U. S. 251 at 256; *Railroad Company v. Husen*, 95 U. S. 465 at 472." (Emphasis ours.)

In *Motor Transit Company v. Railroad Commission of California*, 15 Federal Supplement 630 (1936), a State statute required each agent of a motor stage company selling tickets over highways of the State to procure a license and to get a five thousand dollar bond conditioned on the faithful performance of the contract of transportation. The transportation company operated across the state line and was engaged in interstate commerce.

This Honorable Court, in declaring the Act unconstitutional, held:

"In our opinion the act, admittedly very indefinite in its terms, in effect offends against the commerce clause of the Constitution and that its enforcement is practically impossible, and any attempt to enforce it against complainants would act to their irreparable injury. * * * The decision of the Supreme Court in *DiSanto v. Commonwealth of Pa.*, 273 U. S. 34; 47 S. Ct. 267; 71 L. Ed. 524, is decisive upon that question."

In the case of *Highland Farms Dairy, Inc., v. Agnew*, 300 U. S. 608 (1936), a creamery company in Washington, D. C., purchased milk from farmers in Virginia and Maryland. It sold its entire output of bottled milk to a retail store in Virginia. A Virginia statute set up certain regulations pertaining to the milk industry. The Milk Commission of Virginia realized that the creamery company of Washing-

ton, D. C., was not subject to the provisions of the statute in that its sales and purchases in Virginia were transactions in interstate commerce. It was held that the statute establishing a price minimum would apply only to the milk sold in Virginia by a retailer within the established market area.

We respectfully submit that the cases cited *supra* control the instant case.

3.

Munn v. Illinois, and the decisions of this Court based thereon, do not control the instant case.

We have carefully examined the opinions in *Munn v. Illinois* and the subsequent cases based thereon, and cannot agree that this line of cases controls the present situation. We will take up the cases relied on by the petitioner and point out to this Honorable Court their distinction from the instant case.

In *Munn v. Illinois*, 94 U. S. 113 (1876), the question was whether, as respects an elevator devoted to storing grain for hire, the State could regulate the storage charge, where part of the grain reached the elevator, or was destined to leave it, through the channels of interstate commerce.

This Honorable Court held such a regulation admissible because of the public character of the elevator and because no restriction on *buying* or shipping was involved.

In *Cargill Company v. Minnesota*, 180 U. S. 452 (1900), the court had before it a State statute, much of which had been pronounced unconstitutional by the State court.

In sustaining the provision which remained, this Honorable Court held, page 470:

“The statute puts no obstacle in the way of the *purchase* by the defendant company of grain in the state, or the shipment out of the state of such grain as is purchased.”

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In *Merchants Exchange v. Missouri*, 248 U. S. 365 (1918), the statute involved required that public weighers, appointed for the purpose, should do the weighing and issue weight certificates at elevators used for storing or transferring grain for hire, and prohibited any other person from issuing said certificates at an elevator where a public weigher was stationed. Objection was made to the prohibition on the ground that, as applied to the grain received from or shipped to points without the State, it burdened interstate commerce.

Of course the objection was overruled, the statute being an admissible regulation of the business of conducting an elevator for hire like the statute considered in *Munn v. Illinois*.

In *Budd v. New York*, 143 U. S. 517 (1891), this Honorable Court considered a statute fixing the maximum charge for elevating, receiving, weighing and discharging grain at elevators and warehouses almost exactly as in *Munn v. Illinois*. *The statute had no relation whatever to the purchase or sale of grain.*

In *Brass v. North Dakota*, 153 U. S. 391 (1893), the statute under consideration regulated grain warehouses and the weighing and handling of grain, requiring public warehousemen to give bond to the State, fixing rates of storage and requiring warehousemen to carry insurance. *Here, too, there was no restriction or regulation on buying or selling and the effect on interstate commerce was only incidental and remote.*

In *Townsend v. Yeomans*, 301 U. S. 441 (1936), this Honorable Court was considering the Act of the Legislature of Georgia prescribing the maximum charges which could be made by warehousemen for the handling of tobacco. Under the method of handling tobacco in Georgia the tobacco is brought to the warehouse by the seller and there sold to buyers who immediately ship the tobacco to other

States. Payment for the tobacco is made to the warehouseman who deducts his charges and remits the balance to the sellers.

The Act had no relation whatever to the buying and selling of tobacco and was distinguished by this Honorable Court from the Farmers Grain Company cases by showing that the "Georgia Act lays no constraint upon purchases in interstate commerce, does not attempt to fix the prices or conditions of purchases, or the profit of the purchasers. It simply seeks to protect the tobacco growers from unreasonable charges of the warehousemen for their services to the growers in handling and selling the tobacco for their account."

In Hartford Accident and Indemnity Company v. People of Illinois, ex Rel. McLaughlin, 298 U. S. 155 (1936), the character of the products lost their interstate identity when they came to rest in the State of Illinois with the express purpose of being sold in the State of Illinois. The requirement of a bond did not burden interstate commerce because the business of the defendant was of a local nature and the regulations set up by the State were proper.

We call this Honorable Court's attention to the *Shafer v. Farmers Grain Company* case, cited *supra*, wherein, at page 201, the cases that we have referred to above, and relied on by the petitioner, have been distinguished from the *Shafer* case, and we respectfully submit that the instant case is distinguishable from the said cases in the same manner.

To summarize briefly the distinction between the line of cases relied upon by the petitioner and the cases relied upon by the respondent, we quote from the opinion of the learned Chancellor below (R. 29):

"The distinction between *Munn v. Illinois, Townsend v. Yeomans*, and the other cases relied upon by the plaintiff, on the one hand, and the *Farmers Grain Com-*

pany Cases and the present case, on the other, lies in the fact that in the former the regulation was confined to warehouses, elevators, or other agencies through which interstate commerce might flow, but whose activities were entirely intrastate. In the latter cases the statutes sought to regulate the act of purchasing articles which were to be shipped in interstate commerce, and to prohibit such purchases unless made upon terms prescribed by the statute and by administrative agencies. It is not the milk receiving plant operated by the defendant that the plaintiff seeks to regulate, but the business conducted by the defendant of buying and shipping milk."

The learned Chancellor then expressed the difference in the effect upon interstate commerce of various regulatory statutes in the following manner (R. 30):

"There is a vast difference in the effect upon interstate commerce of a statute regulating a warehouseman or grain elevator through whose hands interstate commerce passes, and a statute regulating and controlling the purchase of a commodity and the transportation thereof in interstate commerce. *Townsend v. Yeomans* does not overrule, directly or indirectly, the *Farmers Grain Company Cases*, but is distinguished from those cases in exactly the same manner as is *Munn v. Illinois*."

4.

The desirability of a statute is not the test in determining its enforcibility if the effect burdens interstate commerce.

However desirable it may be for the Pennsylvania Milk Commission to stabilize the dairy industry, and however necessary it may be for it to regulate the transactions of the respondent and other buyers of milk similarly engaged, to effect this purpose, we contend that the effect of the present statute would be to regulate and to place a burden upon interstate commerce.

The petitioner contends that we should assume the existence of evils justifying the people of the Commonwealth of Pennsylvania in adopting the statute. We respectfully submit that the answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with the Commonwealth of Pennsylvania, but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interest of the people of all the States that are affected.

It is further alleged by the petitioner that the legislation before this Honorable Court is in the interest of the milk producers and essential to protect them from fraud and to secure payment to them of fair prices for the milk actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce, if legislation of that character is needed. These supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which greatly encroach upon the field of interstate commerce placed by the Constitution under Federal control.

The right to buy milk for shipment and to ship it, in interstate commerce, is not a privilege derived from State laws and which the State may fetter with conditions, but is a fundamental right, the regulation of which is committed to Congress and denied to the States by the Commerce Clause of the Constitution.

We respectfully submit that in subjecting the buying for interstate shipment to the conditions and measures of control just shown, the statute directly interferes with and burdens interstate commerce, and is an attempt by the Commonwealth of Pennsylvania to prescribe rules under which an important part of such commerce shall be conducted. We respectfully submit that no State can do this consistently with the Commerce Clause.

The petitioner further contends that if the farmers are underpaid they will be tempted to save the expense of sanitary precautions. There is neither evidence nor presumption that such a situation will result. But, apart from such defects of proof, the evils springing from uncared for cattle must be remedied by measure of repression more direct and certain than the creation of prices. In addition thereto, our milk inspection laws remedy any potential unsanitary conditions.

For the information of this Honorable Court, we respectfully submit that there have been innumerable acts passed covering the period from 1853 to 1935 prohibiting the sale of impure and unwholesome milk and prescribing a host of regulations to insure such supply. These regulations or inspections are separate and distinct from the Milk Act of 1937. This latter Act deals exclusively with the fixing of maximum and minimum prices of milk, whereas the former Acts dealt exclusively with regulations insuring pure and wholesome milk.

It is therefore obvious that the Milk Act of 1937 under consideration cannot be interpreted to be an inspection law. A reference to the Digest of the Pennsylvania Statutes (31 Purdons Statutes, 521-660g) discloses that at present there are many laws in force intended to accomplish the same end and providing severe penalties which apply directly to the evils described in the Preamble of the Milk Control Law.

5.

Does the right of a State, under the exercise of its police power, rise above the prerogative of the Federal Government to control interstate commerce or, at least, exist until the Federal Government exercises some control over the subject matter?

It was contended by the State in the *Farmers Grain Company* cases, as it is contended here, that the regulations could

stand upon the principle which permits the State to make local laws under its police power in the interest and welfare of its people, which are valid although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the States.

It was held that this principle has no application where the State passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it. A State statute which, by its necessary operation, directly interferes with or burdens such commerce is a prohibited regulation regardless of the purpose for which it was enacted.

The Pennsylvania Legislature in adopting the Milk Control Law of 1937 recognized this principle. Section 1202 of the Milk Act provided that no provision of the law shall apply, or be considered to apply to foreign or interstate commerce, except insofar as the same may be effective in accordance with the Constitution of the United States and the Laws of Congress enacted pursuant thereto.

The case of *Townsend v. Yeomans*, *supra*, is strongly relied upon by the petitioner as authority for the proposition that where a matter admits of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act. This, however, does not permit a State to regulate or place a burden upon interstate commerce and this Honorable Court clearly indicated that the State statute there under consideration did not impose such a burden.

This Honorable Court held, at page 455:

“ * * * we find no ground for concluding that the state requirements lay any actual burden upon interstate or foreign commerce. The Georgia Act does not attempt to fix the prices at the auction sales or to regulate the activities of the purchasers. The fixing of rea-

sonable maximum charges for the services of the warehousemen in aid of the tobacco growers does not militate against any interest of those who buy. They pay the bid price, as accepted, and the warehousemen pays the seller, deducting from the purchase price the warehouse charges."

We call this Honorable Court's attention to the *Minneapolis Rate Cases*, 230 U. S. 352 (1913), wherein this principle and its limitations are discussed.

We quote from page 400:

"The principle, which determines this classification (between federal and state power), underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains."

6.

A reversal of the opinion of the court below would nullify the Commerce Clause of the United States Constitution and would unstabilize the milk industry of the United States.

The petitioner submits to this Honorable Court that unless it be given the right to control interstate commerce the milk industry of the United States will be unstabilized and will result in a detriment to the dairy farmers and the consuming public.

We respectfully submit that if the Commonwealth of Pennsylvania were to be sustained in this position the Commerce Clause of the United States Constitution would be nullified and of no legal significance. It would be useless to advance to this Honorable Court any argument touching on interstate commerce. The Commonwealth of Pennsylvania

would have its own regulations concerning interstate commerce and the forty-seven other States would have their own regulations on interstate commerce. We would then find ourselves back to the time of the Constitutional Convention when each State wanted to be free and independent and not subject to a national body which would have exclusive jurisdiction over matters of national importance. Chaos and extensive trade barriers will result if the position of the petitioner, as stated in the fourth reason for granting the petition for certiorari is recognized. It is a matter of common knowledge that trade barriers are rapidly being erected by a number of States.

In conclusion, we wish to say that the development of this country has been built on several forces. One of them has been its vast free market. If we were now to turn back the clock one hundred and fifty years and were to break the country into forty-eight small markets, and even hundreds of smaller markets, the end of our progress is in sight.

Conclusion.

For the reasons urged above, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

ROBERT T. FOX,

CARL B. STONER,

By THOMAS D. CALDWELL,

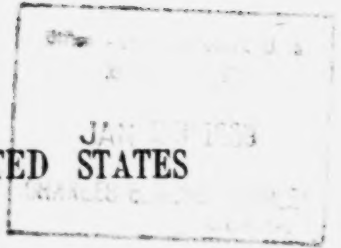
MAURICE YOFFEE,

Counsel for Respondent.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938



No. 426

MILK CONTROL BOARD OF THE COMMONWEALTH
OF PENNSYLVANIA,

Petitioner,

vs.

EISENBERG FARM PRODUCTS, A PENNSYLVANIA
CORPORATION.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR RESPONDENT.

✓
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 426

**MILK CONTROL BOARD OF THE COMMONWEALTH
OF PENNSYLVANIA,**

Petitioner,

vs.

**EISENBERG FARM PRODUCTS, A PENNSYLVANIA
CORPORATION.**

BRIEF FOR RESPONDENT.

I.

Opinions Below.

The opinion of the Supreme Court of Pennsylvania is reported in 332 Pennsylvania 34 (Advance Sheets); 200 Atlantic Reporter 854; and also appears in the record of the present proceedings (R. 32). This opinion, entered June 30, 1938, affirms the decree entered by the Chancellor of the Court of Common Pleas of Dauphin County; the opinions of the latter court are unreported at present; they appear in the record of the present proceedings (R. 15, 26).

II.

Question Presented.

Can the Milk Control Commission of the Commonwealth of Pennsylvania, under the guise of stabilizing the milk industry of this commonwealth, directly burden or regulate milk shipped in interstate commerce?

III.

Foreword.

In the instant case counsel for the respective parties agreed on a "case stated". On the basis of this case stated the issues were presented to the Court of Common Pleas of Dauphin County and to the Supreme Court of Pennsylvania. The arguments before the respective courts were based entirely on the admitted facts. Counsel for the respondent does not want to appear captious in this matter but a careful study of the petitioner's seventy-nine page brief indicates that facts are submitted to this Honorable Court which facts have not been agreed upon nor have they been proven. We are content to rely on the statement of the case presented on page five of the petitioner's brief.

In the first place, the petitioner has injected into its argument and has advanced as facts the reports of the Federal Trade Commission and there also appears a report by Cowden and Fouse on The Supply and Utilization of Milk in Pennsylvania (see page 31 of petitioner's brief). This report tends to establish a survey of the milk industry in Pennsylvania. We respectfully submit that since the figures advanced by the petitioner which were established by the report, have not been agreed upon or proven, we are not bound by them and respectfully ask this Honorable Court not to give any weight to them.

On page forty-nine of the petitioner's brief it is also stated that according to a recent survey, the percentage (with figures supplied) of milk handled in Pennsylvania is greatly disproportionate to the milk exported. This information was likewise obtained from a survey by Cowden and Fouse. The aforementioned objection would likewise apply to this phase of the petitioner's argument.

There is appended to the petitioner's brief (page 77) a petition addressed to the Honorable Henry A. Wallace, Secretary of Agriculture. We inform this Honorable Court that this petition was first seen by the respondent when it was submitted with the printed brief.

The Commissioner of Agriculture and Markets of the State of New York filed a brief to this instant case as *amicus curiae*. This brief is based upon surveys, articles, bulletins, reports and statistics, all of which do not conform with the agreed statement of facts in the instant case. It is all very interesting reading but the argument advanced in the New York brief applies to the State of New York where the milk situation is not on the same plane with the milk situation in Pennsylvania. We respectfully submit that reports of committees, and arguments based thereon, should not bear any weight with this Honorable Court, especially when the reports relate to situations entirely different from the situation in the instant case. We are bound by the statement of facts as agreed upon in the instant case but certainly any argument based upon facts not agreed upon have no legal value in deciding the issues in the present case. The New York brief cited authorities from various parts of this country on the question of the requirements and legality of bonds. We will take up the answer to the argument on the bonding feature in another portion of our brief.

The only issue before this Honorable Court, as we view it, is whether the Milk Control Commission of the Common-

wealth of Pennsylvania can, under the guise of stabilizing the milk industry of this commonwealth, directly burden or regulate milk shipped in interstate commerce, under the stipulated facts.

IV.

ARGUMENT.

We present our argument under five points with a discussion under each point.

1.

Under the authority of the Farmers' Grain Company cases and related cases, the Milk Control Commission of the Commonwealth of Pennsylvania cannot, under the guise of stabilizing the milk industry of this Commonwealth, directly burden or regulate milk shipped in interstate commerce.

The Milk Control Act shows a comprehensive scheme to regulate the buying and selling of milk. Purchases can be made only by those who hold licenses from the Commonwealth. Such purchasers must file bonds conditioned for the prompt payment by the licensee of all amounts due to producers, under this Act and orders of the Board, for milk sold by them to such licensee subsequent to the posting of such bond. They also keep certain records. The milk can only be purchased subject to the minimum price established by the Milk Control Commission. That is, under the asserted authority, the Milk Control Commission may fix and determine the price to be paid for milk which is bought, shipped and sold in interstate commerce.

Applying the facts to the statute, it would appear that the statute denies the privilege of engaging in interstate commerce except to dealers licensed by the Commonwealth of Pennsylvania, and provides a system which enables the Milk

Control Commission to fix the profit which may be made in dealing with the subject matter of interstate commerce.

It is our contention that even if the regulations are not directed solely against interstate commerce but nevertheless, directly affect it, they must be declared invalid, regardless of the proportion which such commerce bears to the total commerce of the State.

In the case of *Public Utility Commission v. Attleboro Steam and Electric Company*, 273 U. S. 83, the court held on page 90:

"The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business, it is none the less beyond the power of the state because this may be a smaller part of its general business."

In *Electric Bond and Share Company v. Securities and Exchange Commission*, 92 Federal Reporter (Second Series) 530, at page 588, the court held:

"Congressional regulation of such interstate business is in no way dependent upon the relative amounts of interstate or intrastate business done."

In *Consolidated Edison Company of New York v. National Labor Relations Board*, reported to Nos. 19, 25 October Term, 1938, and decided December 5, 1938, it appears that the petitioners are public utilities who in 1936 supplied about ninety-seven and one-half per cent of the total electrical energy in the State of New York. The companies do not sell for resale outside of the State. The companies supply the New York Central Railroad, the New York-New Haven and Hartford Railroad, the Hudson and Manhattan Railroad (operating a tunnel service to New Jersey), the

Western Union, Postal Telegraph and the New York Telephone Company. The petitioners likewise supply electrical energy to the Federal Government under contract for the lighthouses, harbor lights and post offices. The National Labor Relations Board maintains that it has jurisdiction over the petitioners in view of the fact that some of the electrical energy is supplied in interstate commerce and if industrial strife resulted interstate commerce would be crippled. The petitioners urge that the Legislature of New York had enacted adequate measures to protect against the interruption of petitioner's services through labor disputes by State Labor Relations Board. The State act follows closely the National act. Mr. Chief Justice Hughes, in writing the opinion of the Court, held :

"It cannot be doubted that these activities, while conducted within the state, are matters of Federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the Federal protective power."

The Court further held that the effect upon interstate commerce through industrial strife would be far reaching.

Likewise, in the case of *Milk Control Board of the Commonwealth of Pennsylvania v. Eisenberg Farm Products*, 332 Pennsylvania 34 (Advance Sheets), at page 39, wherein the opinion of the court below is printed, the court held :

50 "Undoubtedly the laws of Pennsylvania relating to milk control were not enacted for the primary purpose of regulating interstate commerce, but if they have that effect they are invalid as applied to such interstate commerce regardless of the proportion which such commerce bears to the total commerce of the state."

See also *Wallace v. Currin*, 95 Federal Reporter (Second Series) 856.

If the respondent in the instant case is required to pay the milk producers, not the agreed price, but the price fixed by the Commission and also to post a bond to secure payment to the producers of the prices fixed by the Commission, and also to pay license fees, the cost of the milk to it would be increased by the premium on the bond, by the license fee, and by the increase in price ordered by the Commission. The effect of such regulation and such price fixing would be exactly equivalent to the imposition of a tax on the export of milk.

In *Covington and Cincinnati Bridge Company v. Kentucky*, 154 U. S. 204, the Commonwealth of Kentucky attempted to prescribe a schedule of tolls upon a bridge connecting with the State of Ohio. This was done without the assent of Congress, and without the concurrence of such other State in the proposed tariff. The court held, page 212:

“That, while the states have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several states, they have no right to tax such commerce itself, is too well settled even to justify the citation of authority.”

In the case of *Reading Railroad Company v. Pennsylvania*, 151 Wall. 232, the Legislature of Pennsylvania attempted to lay a tax on commodities transported in interstate commerce. The court held that the imposition of the tax, whether large or small, was a restraint upon the privilege or right to have the subjects of commerce passed freely from one State to another, without being obstructed by the intervention of State license. Its payment was a condition upon which the prosecution of that branch of commerce was made to depend, and its imposition, therefore, was in conflict with the power of Congress over the subject.

In *Gwin, White and Prince, Inc., v. H. H. Henneford et al.*, reported to No. 75 October Term, 1938, and decided on Janu-

ary 3, 1939, the question before the Court was whether the State of Washington can levy a tax measured by the gross receipts of the appellant from its business of marketing fruit shipped from the State of Washington to other States. The defense claimed that the tax was a burden on interstate commerce. It was agreed that the shipment of fruit from the State of origin to points outside involve interstate commerce but the appellee contended that the appellant's activities in the State of Washington in promoting the commerce was a local business and subject to the State tax. Mr. Justice Stone, in writing the opinion, held:

"Such a tax burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce."

In *Arkansas-Louisiana Pipe Line Company v. Coverdale*, 20 Federal Supplement 676, the State attempted to impose a tax on the horsepower of engines used in transporting the natural gas by pipe line from one State to another. Ninety-six per cent of the gas collected is transported in interstate commerce. The court held that the engines used to draw the gas from the wells were instrumentalities of interstate commerce, and any tax laid upon objects or articles passing in interstate commerce or the instrumentalities or agency by which it is carried on, is invalid and beyond the State power under the Commerce Clause of the Federal Constitution.

In the case of *United States v. Seven Oaks Dairy Company*, 10 Federal Supplement 995, the court held in addition to the proposition that the purchase of a commodity in one State for the purpose of transporting it to another State is a transaction in interstate commerce and not subject to burdens imposed by State regulations, that *where the business involved interstate commerce, State statutes regulating prices have been declared invalid as a direct burden*

upon interstate commerce. The court reviewed many authorities before arriving at its conclusion.

The highest court of the Commonwealth of Pennsylvania ruled that the instant case was controlled by the case of *DiSanto v. Pennsylvania*, 273 U. S. 34. In addition to this authority we urge upon this Honorable Court that the instant case is also governed by the *Farmers' Grain Company* cases, referred to hereafter.

The law as stated in the *DiSanto* case is a consistent statement of the law of the United States Supreme Court with respect to the issue involved. Mr. Justice Butler wrote the opinion in the *DiSanto* case and followed the principle of law established by the *Farmers' Grain Company* cases. Mr. Justice Brandeis filed a dissenting opinion wherein it was stated that the facts in the *DiSanto* case were unlike the facts considered in the *Farmers' Grain Company* cases, and that the statute in the *DiSanto* case did not affect the price of articles moving in interstate commerce, and that licensing and supervision of dealers in steamship tickets could be considered an inspection law. Mr. Justice Brandeis distinguished the facts in the *DiSanto* case from the facts in the *Farmers' Grain Company* cases without intimating that the law in the *Farmers' Grain Company* cases was not still the law, or that the law in the latter cases should be modified or changed.

We likewise urge upon this Honorable Court that the statute in the instant case could not be interpreted as an inspection law in view of the separate and distinct inspection laws passed by the Commonwealth of Pennsylvania and referred to hereafter in our brief.

The regulation sought to be imposed in the instant case is similar to the regulation sought to be imposed in *Lemke v. Farmers' Grain Company*, 258 U. S. 50. In that case a North Dakota Act required that purchases of grain could

be made only by those who hold licenses from the State, paid State charges for the same and acted under a system of grading, etc. defined in the act, and that grain could only be purchased subject to the power of the inspector to determine the margin of profit which the buyer should realize upon his purchase. The defense was that the buying of grain in North Dakota for shipment to other States was interstate commerce and, therefore, the regulatory act of North Dakota was a direct burden on interstate commerce.

This Honorable Court outlined the control to be exercised under the State act, and enunciated the following principle of law:

“That such course of dealing constitutes interstate commerce there can be no question. * * * That is, the state officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. *That this is a regulation of interstate commerce is obvious from its mere statement.*”
(Emphasis ours.)

This Honorable Court had reaffirmed the principle established in the case of *Dahnke-Walker Milling Company v. Bondurant*, 257 U. S. 282.

Three years later this Honorable Court had occasion to review and decide the very important case of *Shafer v. Farmers' Grain Company*, 268 U. S. 189. In that case the North Dakota Statute provided, among other things, a uniform system of grades, weights and measures and provided that a buyer operating a public grain elevator must obtain a yearly license, the fee for which was to be adjusted to the capacity of the elevator, and required those operators who do not pay cash in advance for wheat purchased, to file with the supervisor a sufficient bond to secure payment for all wheat bought on credit, and to keep records of all purchases. The statute also required the State supervisor to investi-

gate and supervise the marketing of grain for the purpose of preventing various things which were deemed unjust and fraudulent, and authorized him to make rules and regulations to carry out the provisions of the act. The plaintiffs challenged the validity of the act under the Constitution of the United States on the ground that it interfered with and burdened interstate commerce. This Honorable Court held:

“Buying for shipment and shipping, to markets in other states when conducted as before shown, constitutes interstate commerce—the buying being as much a part of it as the shipping. We so held in *Lemke v. Farmers’ Grain Company*, *supra*, following and applying the principle of prior cases. Later cases have given effect to the same principle. *Stafford v. Wallace*, 258 U. S. 495, 516; *Binderup v. Pathe Exchange*, 263 U. S. 291, 309; * * *.”

We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the State to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the Commerce Clause.

In the case of *Public Utility Commission v. Attleboro Steam and Electric Company*, 273 U. S. 83, a Rhode Island corporation sold electricity to a Massachusetts corporation and transmitted the electric current to the State line. The Rhode Island Commission placed into effect a new schedule of rates which were opposed by the Massachusetts corporation. It was conceded in this case that the sale and transmission of electric current was a transaction in interstate commerce. The Supreme Court was confronted with two lines of cases, the one line of cases being headed by *Missouri v. Kansas Gas Company*, 265 U. S. 98, and the other

line of cases being headed by *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S. 23. The Court followed the line of cases headed by *Missouri v. Kansas Gas Company* and held, page 90:

"Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either state, but is essentially national in character. The rate is therefore, not subject to regulation by either of the two states in the guise of protection to their respective local interests; but, *if such regulation is required it can only be attained by the exercise of a power vested in Congress.* See *Covington and Cincinnati Bridge Company v. Kentucky*, 154 U. S. 204, 220; *Hanley v. Kansas City S. Railway Company*, 187 U. S. 617, 620." (Emphasis ours.)

The court differentiated the facts in the *Kansas* case from the facts in the *Pennsylvania* case in the following manner: In the *Kansas* case natural gas was transported from Oklahoma and Kansas into Missouri and there sold to distributing companies which then sold and delivered the gas to the local consumers. In the *Pennsylvania* case natural gas was transmitted from Pennsylvania to New York where it was subdivided and sold retail to local consumers. The distinction was placed on the following ground: In the *Pennsylvania* case the service to the consumers was "essentially local", and the things done were after the business, in its essentially national aspect, had come to an end—the supplying of local consumers being "a local business", even though the gas is brought from another State. While in the *Kansas* case the sale of natural gas in wholesale quantities, not to consumers, but to distributing companies for resale to consumers, where the transportation, sale and delivery constitutes an unbroken chain, fundamentally interstate from beginning to end, "the paramount interest is not local but national, admitting of

and requiring uniformity of regulation," which "even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned."

We respectfully submit that the facts in the instant case are analogous to the facts in the *Kansas* case wherein the sale, transportation and delivery of milk constituted an unbroken chain, fundamentally interstate from beginning to end and that the paramount interest is not local but national, admitting of and requiring uniformity of regulation. We respectfully submit that the authority of the *Kansas* case which was relied upon in the *Attleboro* case can likewise be used as a supporting authority in the instant case.

This Honorable Court in the *Attleboro* case cited with approval the cases of *Shafer v. Farmers' Grain Company*, *supra*, *DiSanto v. Pennsylvania*, *supra*. The court further held that the regulation of rates between the two companies imposed a direct burden upon interstate commerce and since the forwarding State has no more authority than the receiving State to place a direct burden upon interstate commerce the rates must necessarily fall regardless of its purpose.

In *Buckingham Transportation Company v. Black Hills Transportation Company*, 281 North Western Reporter 94 (Advance Sheets), the South Dakota Railroad Commission attempted to exclude a motor carrier from interstate traffic because of the failure of the motor carrier to obtain a certificate from the Commission permitting it to operate over the State highways. Buckingham held a certificate from the Interstate Commerce Commission authorizing him to operate as a common carrier by motor vehicle in the course of interstate commerce over certain South Dakota highways, though he did not have a certificate to operate

as a common carrier over intrastate commerce within the State of South Dakota. The court held that the business of the motor carrier was interstate rather than intrastate in character and therefore the State Railroad Commission was without power to order the motor carrier to cease and desist from transporting such merchandise within the State without a permit to operate as a common carrier on the State highways.

In *J. D. Adams Manufacturing Company v. Storen*, 58 Supreme Court Reporter 913 (Advance Sheets), an Indiana Act imposed a tax on the receipt of the gross income of every resident of the State and of every nonresident, derived from sources within the State. It appears that the appellant in this case sold eighty per cent of its products in interstate commerce. This Honorable Court held (page 916):

"We have repeatedly held that such a tax is regulation of, and a burden upon, interstate commerce prohibited by Article 1, Section 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce. * * * It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate."

See also *Bluefield Products and Provision Company v. The City of Bluefield*, 196 South Eastern Reporter 568; *Gwin-White & Prince, Inc. v. H. H. Henneford et al.*, *supra*.

In *Pacific Telephone and Telegraph Company v. Henneford*, 81 Pacific Reporter (Second Series) 786, the State attempted to tax telephone equipment which was purchased at retail outside of the State and used within the State

for inter and intrastate business. The court held the tax invalid in so far as it taxes the use of an instrumentality of interstate commerce. See also *Arkansas-Louisiana Pipe Line Company v. Coverdale*, 20 Federal Supplement 676.

In *Port of Port Angeles v. Henneford*, 74 Pacific Reporter (Second Series) 1025, the State Tax Commission levied a business and occupation tax on corporations engaged in operating terminals upon the navigable waters of the State. Cargo moving through these terminals come from other States and are trans-shipped to other States. The dock companies do some business which is purely local in character. The court held that the dock companies' earnings from transporting goods arriving from other States are realized from operations in "interstate commerce" and hence not subject to state business and occupation tax.

In *Stafford et al. v. Wallace et al.*, 258 U. S. 495, livestock was consigned to the stockyards in Chicago where they were sold; some were slaughtered in packing houses within Chicago, while others were shipped to packing houses outside of the State of Illinois for slaughter. The question arose as to whether the above arrangement was a transaction in interstate commerce. The court held:

"The principles of the Swift case have become a fixed rule of this court in the construction and application of the Commerce Clause. Its latest expression on the subject is found in *Lemke v. Farmers' Grain Company*, Ante. 50. * * * Accordingly a state statute which sought to regulate the price and profit of such sales was found to interfere with the free flow of interstate commerce was declared invalid as a violation of the Commerce Clause." (Emphasis ours.)

The court cited numerous authorities upon which it based its decision.

We respectfully submit that the Milk Control Board is attempting to do what is expressly prohibited in a statement by this Honorable Court, the regulation sought to be imposed on the respondent by the petitioner is a regulation fixing the price and profit of milk shipped in interstate commerce, and under the authority of the *Stafford* case, and other related cases, it is expressly prohibited.

In the case of *United States et al. v. Seven Oaks Dairy Company*, 10 Federal Supplement 995, this Honorable Court, after an extensive review of all the authorities held:

“And where the business involved interstate commerce, state statutes regulating prices have been declared invalid as a direct burden upon interstate commerce.”

In *Baldwin v. Seelig*, 294 U. S. 511, a statute in New York attempted to regulate the price of milk to be paid in Vermont for shipment into New York. Without questioning the fact that the transaction was one in interstate commerce, the late Mr. Justice Cardozo, in delivering the opinion of this Court, said:

“Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if custom duties, equal to the price differential, had been laid upon the thing transported * * *. *‘It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.’*”

“Milk may be excluded if necessary safeguards have been omitted; but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. * * *. Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow

of commerce in its movement between states. Cf. *Asbell v. Kansas*, 209 U. S. 251 at 256; *Railroad Company v. Husen*, 95 U. S. 465 at 472." (Emphasis ours.)

In the case of *Missouri v. Kansas Natural Gas Company*, 265 U. S. 298, gas was transported from Oklahoma and Kansas into Missouri and delivered to distributing companies, who would then in turn sell the gas to local consumers. The State attempted to regulate the transportation of this gas. The Court held:

"But the sale and delivery here is an inseparable part of a transaction in interstate commerce—not local but essentially national in character—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the Commerce Clause to secure and preserve. It is as though the commission stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the state and before it had become part of the general mass of property therein. See *Brown v. Houston*, 114 U. S. 622, 634. There is nothing in *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S. 23, inconsistent with this view."

In *Pennsylvania v. West Virginia*, 262 U. S. 553, the question before the Court was whether a State, wherein natural gas is produced, and is a recognized subject of commercial dealings, may require that in its sale and disposal, consumers in that State shall be accorded a preferred right of purchase over consumers in other States, when the requirement necessarily will operate to withdraw a large volume of the gas from an established interstate current, whereby it is supplied to consumers in other States. The Court held:

"By the Constitution, Article 1, Section 8, Clause 3, the power to regulate interstate commerce is especially

committed to Congress and therefore impliedly forbidden to the states. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the states have assented to it, all are alike bound by it, and all are equally protected by it.”

We respectfully submit that the cases we have cited are on all fours in principle with the instant case. The requirements with respect to the securing of a license and the filing of a bond conditioned for the payment of milk purchased upon the terms and conditions as the Board may prescribe would, in the language of *Baldwin v. Seelig*, indirectly regulate the prices to be paid to producers of commodities in interstate commerce. Since the buying as well as the shipping of milk from Pennsylvania to New York constitutes interstate commerce, the Commonwealth cannot regulate incidents pertaining to the buying of milk in Pennsylvania, as it, by indirection, would affect the interstate character of the entire transaction. See *Pennsylvania Railroad Company v. Clark Coal Company*, 238 U. S. 456; *Talbot v. Smith*, 277 South Western 257; *Community Natural Gas Company v. Royse City*, 7 Federal Supplement 481.

In *Highland Farms Dairy, Inc., v. Agnew*, 300 U. S. 608, a creamery company in Washington, D. C., purchased milk from farmers in Virginia and Maryland. It sold its entire output of bottled milk to a retail store in Virginia. A Virginia statute established certain regulations burdening to the milk industry. The Milk Commission of Virginia conceded that the creamery company of Washington, D. C., was not subject to the provisions of the statute, because its sales and purchases in Virginia were transactions in interstate commerce. It was held that the statute establishing a price

minimum would apply only to the milk sold in Virginia by a retailer within the established market area. The late Mr. Justice Cardozo stated the principle which we are urging upon this Honorable Court, as follows :

“Highland in Washington may sell to High in Virginia and High may buy from Highland, at any price they please.”

In *Motor Transit Company v. Railroad Commission of California*, 15 Federal Supplement 630, a State statute required each agent of a motor stage company selling tickets over highways of the State to procure a license and a five thousand dollar bond conditioned on the faithful performance of the contract of transportation. The transportation company operated across the State line and was engaged in interstate commerce. This Honorable Court, in declaring the act unconstitutional, held :

“In our opinion the act, admittedly very indefinite in its terms, in effect offends against the commerce clause of the Constitution and that its enforcement is practically impossible, and any attempt to enforce it against complainants would act to their irreparable injury.
• • • The decision of the Supreme Court in *Di Santo v. Commonwealth of Pa.* 273 U. S. 34; 47 S. Ct. 267; 71 L. Ed. 524, is decisive upon that question.”

We call this Honorable Court's attention to the condition of the bond in the above stated case as compared to the condition of the bond in the instant case. In the instant case the bond was conditioned upon the payment of the *price fixed* by the Milk Board. In the *California* case, *supra*, the bond was conditioned on the faithful performance of the contract of transportation. We respectfully submit that the instant case is a stronger case on its merits, as the effect of the requirement of the bond would regulate prices of commodities in interstate commerce, while the *California* case the

bond was merely conditioned for *faithful performance*. We will discuss the bond question in another portion of our brief when we take up the brief of the State of New York and compare it with the bond requirement in Pennsylvania.

In *Clover Fork Coal Company v. National Labor Relations Board*, 97 Federal Reporter (Second Series) 331, efforts were made to unionize petitioner's employees who worked in petitioner's mine. Petitioner owned two thousand acres of land in Kentucky and mined approximately three hundred thousand tons of coal per year, which it sold f. o. b. mine, and subsequently shipped in interstate commerce. Petitioners claimed that it was not engaged in interstate commerce; that its operations did not affect interstate commerce in view of the fact that all its activities were carried on in Kentucky. The court held that the effect of industrial strife upon interstate commerce is the test in determining the jurisdiction of the Congressional power. Even though the activities of the company are local in character, the matter, nevertheless, comes within the exclusive jurisdiction of the Federal Government in view of the fact that the subject matter attempted to be regulated would affect national industrial strife.

In *United States v. Corinth Creamery, Inc.*, 21 Federal Supplement 265, a Vermont creamery solicited and received milk as agents of producers, title remaining in the producers. The creamery sold milk to purchasers in Massachusetts. The creamery provided the transportation of the milk to the market and charged the producer a certain amount for the service, and then paid the net proceeds to the producer. The creamery produced no milk. The question arose as to whether or not the creamery was subject to the statutes and orders of the Agricultural Adjustment Act of the Federal Government. The court held, in effect, that the creamery was engaged in interstate commerce and was

subject to the regulations of the act. We call the Honorable Court's attention to the significance of this case as we feel it bears directly on the issue in the instant case. All the activities of the creamery company were purely local in character. The milk was received within the State of Vermont. The creamery company performed many services which were local in character. The ultimate destination of the milk was in interstate commerce. The court did not discuss the local activities of the creamery company in Vermont as being distinct from the interstate activities, and we respectfully submit that the local activities were not considered because the ultimate destination was in interstate commerce. This being true, the Federal Government had exclusive jurisdiction. The facts in the instant case can be likened to the situation in the *Corinth* case in that all the activities of the respondent were destined in interstate commerce, and hence it follows that the Federal Government would have exclusive jurisdiction.

We respectfully submit that under the authorities submitted on this phase of the case, the principle of law established by them should control the instant case.

2.

Munn v. Illinois and the Decisions of this Court based thereon, together with the other authorities relied on by the petitioner, do not control the instant case.

We have carefully examined the opinions of *Munn v. Illinois* and the subsequent cases based thereon, and cannot agree that this line of cases controls the present situation. We will take up the cases relied upon by the petitioner and point out to this Honorable Court their distinction from the instant case.

In *Munn v. Illinois*, 94 U. S. 113, the question was whether, as respects a public elevator devoted to storing grain for

hire, the State could regulate the storage charge, where part of the grain reached the public elevator, or was destined to leave it, through the channels of interstate commerce.

This Honorable Court found that the vast production of grain was limited to seven or eight great States of the west and said grain had to pass on the way to four or five other states on the seashore. The court further found that the situation as it existed in 1874 showed that the fourteen warehouses in Chicago were owned by thirty persons, nine business firms controlled them. The grain warehouses in Chicago held from three hundred thousand to one million bushels. The court further found that these public elevators stand in the very "gateway of commerce" and take toll from all who pass. That their business most certainly "tends to a common charge and is become a thing of public interest and use". The court further found that the business of public warehousemen was affected with a "public interest" and devoted to a "public use". The court further found that the business is likewise a "virtual monopoly." The court held, page 135:

"The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the state of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another."

Mr. Justice Field and Mr. Justice Strong filed a dissenting opinion. Mr. Justice Field based his opinion on the theory that the business of warehousemen was not "affected with a public interest" in that the right to do business was not given by the State. He further remarked, page 146:

"It is only where some right or privilege is conferred by the government or a municipality upon the owner, which he can use in connection with his property, or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant. * * * When the privilege ends, the power of regulation ceases."

Mr. Justice Fields made a distinction between the privilege conferred upon a hackman or drayman for the use of stands on the public streets, and the conduct of a warehouse, where no right or privilege is conferred by the Government upon the warehouseman. Mr. Justice Field further remarked appropriately :

"But I deny the power of any legislation of our government to fix the price which one shall receive for his property of any kind. If the power can be exercised as to one article, it may as to all articles, and the prices of everything, from a calico gown to a city mansion, may be the subject of legislative direction."

Mr. Justice Fields further stated that the business of a warehouseman was at common law a private business, and did not require any prerogative or privilege of the crown to conduct said business. He further remarked that no reason can be assigned to justify legislative interference with the legitimate profits of that business, that would not equally justify an intermeddling with the business of every man in the community so soon, at least, as his business became generally useful.

The crux of the case in the majority opinion was based on the fact that the statute had no relation whatever to the purchase or sale of grain.

In the case of *Covington and Cincinnati Bridge Company v. Kentucky*, 154 U. S. 204, this Honorable Court distinguished the case of *Munn v. Illinois*, *supra*, on the ground that the decision in the *Munn* case was predicated on the principle that elevators were property "affected with a public interest". The court further remarked, page 213:

"That the decision does not necessarily imply a power in the states to prescribe similar regulations with respect to railroads and other corporations directly engaged in interstate commerce is evident from the remarks of the Chief Justice, page 135, in delivering the opinion of the court * * *. The principle of this case has been recently affirmed in *Budd v. New York*, 143 U. S. 517 and reaffirmed in *Brass v. North Dakota*, 153 U. S. 391, though not without strong opposition from a minority of the court."

In *Budd v. New York*, 143 U. S. 517, the facts were very similar to the facts in the case of *Munn v. Illinois*. The court held that the business of elevating grain was "affected with a public interest", that when private property was devoted to a "public use" it was subject to regulation, that their business tended "to a common charge", and had become a thing of public interest and use, and that the toll on the grain was a common charge. The court followed the *Sinking Fund* cases, 99 U. S. 700, and stated that when a business becomes a matter of such "public interest" and importance as to create a "common charge" or a burden upon the citizens, in other words, when it becomes a "practical monopoly" to which the citizens are compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to the regulation by a legislative power. This statement was made by Mr. Justice Bradley in his dissenting opinion in the *Sinking Fund* cases, *supra*, but was regarded as the principle of the decision in *Munn v. Illinois*. The test

as applied by the courts seem to hinge on whether or not the business to be regulated was a "practical monopoly".

A review of the cases cited in *Budd v. New York* and their similarity to *Munn v. Illinois* indicates that the above test was applied to every situation that was to be regulated. We quote from page 545 of the opinion:

"Not only is the business of elevating grain affected with a public interest, but the records show that it is an *actual monopoly*, besides being incident to the business of transportation and to that of a common carrier, and thus of a quasi public character."

The court did not seem to have any difficulty with respect to the operation of this statute *within* the state of New York, as is evidenced by the following statement, page 545:

"So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the state of New York. It operates only within the limits of that state, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in *Munn v. Illinois*. It is of the character with navigation laws in respect to navigation *within the state*; and laws regulating wharfage rates within the state, and other kindred laws." (Emphasis ours.)

Mr. Justice Brewer, Mr. Justice Field and Mr. Justice Brown filed an illuminating dissenting opinion, page 549. The dissenting members of the court state their views as follows:

"The vice of the doctrine is, that it places a public interest in the use of property upon the same basis as a public use of property. Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to wit, the state, has a right to create and maintain, and, therefore, one which all

the public have a right to demand and share in . . . But this public use is very different from a public interest in the use. There is scarcely any property in whose use the public has no interest. . . . I cannot bring myself to believe that when the owner of property has by his industry, skill and money made a certain piece of his property of large value to many, he has thereby deprived himself of the full domain over it which he had when it was of comparatively little value; nor can I believe that the *control of the public over one's property or business is at all dependent upon the extent to which the public is benefited by it.*" (Emphasis ours.)

The dissenting Justices further remarked that since there were no exclusive privileges given to these elevator men and that the elevators were not upon public ground, they cannot be considered a monopoly of fact, which can be broken by the building of additional elevators, and therefore there was no necessity for legislative interference. Mr. Justice Brewer wrote the dissenting opinion which was concurred in by Mr. Justice Field and Mr. Justice Brown, and made a very pertinent statement, page 551:

"I believe the time is not distant when the evils resulting from this assumption of a power on the part of government to determine the compensation a man may receive for the use of his property, or the performance of his personal services, will be so apparent that the courts will hasten to declare that government can prescribe compensation only when it grants a special privilege, as in the creation of a corporation, or when the service which is rendered is a public service, or the property is in fact devoted to a public use."

The crux of the case in the majority opinion was based on the fact that the statute had no relation whatever to the purchase or sale of grain.

In *Brass v. North Dakota*, 153 U. S. 391, the facts were substantially the same as in the case of *Munn v. Illinois*,

supra. The court followed the decision of *Munn v. Illinois* on the theory that the business of warehousemen created a "common charge or burden upon the citizens, and that the said business was practically a monopoly." Mr. Justice Brewer, Mr. Justice Field, Mr. Justice Jackson and Mr. Justice White filed a dissenting opinion on the ground that no "practical monopoly" to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, has been shown to exist in the private enterprise of a warehouseman. The dissenting opinion further stated that the elevator man having originally engaged in a private enterprise, is now compelled by the decision in the case to receive, store and discharge the grain which is tendered to him, and also to insure and pay the cost of insurance, which cost can be more than he receives for the whole service. By the decision in the case, a warehouseman is compelled to accept business from others even though it was not his original intention.

The crux of this case was based on the ground that there was no restriction or regulation on the buying or selling of grain.

In *Champlin Refining Company v. Commission*, 286 U. S. 210, an Oklahoma statute attempted to regulate the amount of oil that could be produced in certain parts of the State. The plaintiff contended that the act and proration orders operated to burden interstate commerce in crude oil in violation of the Commerce Clause. The court held that the regulation leading up to the production can be regulated. In other words, the reduction to possession can be likened to the manufacture of an article, but once the article is in interstate commerce it cannot be regulated. The act applied only to production and not to sales or transportation of crude oil or its products in interstate commerce.

In *Chicago Board of Trade v. Olsen*, 262 U. S. 1, a Federal Act placed a supervision of the Board of Trade of Chicago

under the Secretary of Agriculture, and imposed conditions on the right to sell, in order to prevent the manipulation of prices or the cornering of grain by dealers on the Board. It appeared that grain was shipped into Chicago markets from other States, stored temporarily and sold on the Chicago Board of Trade, and later reshipped in large part to other States. The court said, on page 41, that the authority of *Munn v. Illinois* was not bothersome and concluded that the Chicago Board of Trade is engaged in a business affected with a "public national interest" and, subject to national regulation as such. We respectfully submit that this case can be cited with authority for the respondent in view of the fact that the facts in the *Olsen* case can be likened to the facts in the instant case. Since it is conceded in the instant case that the milk is in interstate commerce, following the authority of the *Olsen* case we conclude that it is a business affected with a "public national interest" and therefore is subject to national legislation.

In *W. W. Cargill Company v. Minnesota*, 80 U. S. 452, the act attempted to regulate the operation of elevator warehouses. Much of the act had been declared unconstitutional, but of the part that was sustained, the court stated, page 470:

"The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state, or the shipment out of the state of such grain as is purchased."

The court further remarked that the license had reference only to the business of the defendant at its elevator, and applied only to a business conducted at an established warehouse. We call this Honorable Court's attention to the fact that the *Munn* case was not relied upon in the above stated case.

In *Merchants Exchange v. Missouri*, 248 U. S. 365, the Court, relying upon the *Cargill* case, stated that the regula-

tion of weights and measures at elevators, used for the storing or transferring of grain for hire, was valid in view of the fact that it prevented fraud and facilitated commercial transactions. The act specifically applied to the business conducted at an established warehouse such as appeared in the *Cargill* case.

In *Mayor of New York v. Miln*, 11 Pet. 102, an act required the filing of reports by pilots of ships who enter the city of New York. The court held this to be a local regulation to prevent the importation of criminals and people of bad repute into the State, without the police having a record of it. This was a local regulation and applied only after the interstate character of the movement had ended. The act was clearly a quarantine law.

In *South Carolina v. Barnwell Brothers*, 303 U. S. 177, an act regulated the use of highways within the State of South Carolina. This act was clearly a safety measure.

In *Payne v. Kansas*, 248 U. S. 112, the requirements of a license and bond for commission merchants was limited to intrastate commerce. The question of interstate commerce was not brought into the case. The act related to local transactions within this State.

In *New Mexico v. Denver and Rio Grande Railroad Company*, 203 U. S. 38, an act provided for the inspection of hides that were to be exported out of the State. The act was labelled an inspection law for two reasons: first, to prevent the spread of disease and, secondly, to facilitate the detection of stolen hides.

In *Willson v. Blackbird Creek Marsh Company*, 2 Pet. 245, the State attempted to dam a creek where the tide ebbed and flowed. The defense advanced the argument that the act interfered with interstate commerce. The court held this a proper regulation because the value of the adjoining land was enhanced and the health of the people living thereby was improved. This was clearly a health measure

and no attempt was made to regulate the articles in interstate commerce.

In *People v. Peretta*, 253 New York 302, the act specifically regulated milk shipped and sold *within* the State of New York. No question was raised with respect to milk shipped in interstate commerce. The act was clearly a local regulation.

In *Federal Trade Commission v. Standard Education Society*, 58 Supreme Court 113, the act specifically regulated the use of trade marks. The question of interstate commerce or its regulation was not before the Court.

Thompson v. Consolidated Gas Utility Corporation, 300 U. S. 55; *Champlin Refining Company v. Commission*, 286 U. S. 210; *West v. Kansas Natural Gas Company*, 221 U. S. 229, all provide that regulatory measures, for conservation of their own natural resources, are not valid if interstate commerce is burdened.

In *Sligh v. Kirkwood*, 237 U. S. 52, the Florida act regulated the transportation of immature citrus fruit from the State of Florida to other States. The Court held this a health measure in that the reputation of the transporting State was at stake, and further that the health of the inhabitants of the other States would be jeopardized if immature citrus fruit was permitted to be exported.

The cases of *Patapsco Guano Company v. Board of Agriculture*, 171 U. S. 345; *National Fertilizer Association v. Bradley*, 301 U. S. 178; involve measures promulgated by the States in order to prevent fraud upon their own people in the purchase of commodities imported from other States, and also to prevent crime and detect criminals in the transporting of products from the State. The measures were confined to products within the State or about to come within the State. This class of legislation comes under the category of inspection laws.

In *Mintz v. Baldwin*, 289 U. S. 346, a New York act provided for the production of a certificate from the origin State to the effect that the cattle imported were free from disease. This was clearly a health measure for the protection of its own inhabitants.

In *Hall v. Geiger-Jones Company*, 242 U. S. 539, an act was passed to regulate the sale of securities within the State. The Court held that the regulation only applied to securities offered for sale within the State for the protection of the public against fraud.

In *Chassanoil v. Greenwood*, 291 U. S. 584, the court held that incidents leading up to the shipment of the commodity in interstate commerce are transactions in intrastate commerce. The Court further remarked that the *Lemke* case, *supra*, had no application as the regulations in the latter case imposed direct burdens on interstate commerce, while in the *Mississippi* case the regulation was directed to the transaction before it took on the interstate character.

In *Erie Railroad Company v. Board of Public Utility Commissioners*, 254 U. S. 394, an order directed the abolishing of grade crossings. The petitioner cites this case as an authority for the requirement of bonds. We respectfully submit that there is nothing in the case requiring the furnishing of a bond.

In *Hartford Accident and Indemnity Company v. Illinois*, 298 U. S. 155, a bond was required from those who sold produce within the State even though the produce was shipped from other States. The Court held that the produce lost its interstate character when it came to rest within the State of Illinois and was to be sold within the State and, hence a bond requirement for a local business was a valid regulation.

In *Smith v. Alabama*, 124 U. S. 465, a regulation required the examination of engineers before they could qualify for road service. The Court held the regulation valid for the

safety of the public, since it only applied to persons within the State.

In *Texas Transport and Terminal Company v. New Orleans*, 264 U. S. 150, and *McCall v. California*, 136 U. S. 104, a tax was imposed on the business of the sale of steamship and transportation tickets. The Court held that the business was interstate in character and any regulation thereof amounted to a burden and therefore was invalid. Both of these cases were cited with approval in the *DiSanto* case, *supra*.

The case of *Townsend v. Yeomans*, 301 U. S. 441, was strongly relied upon by the petitioner in the lower court for the proposition that where a matter admits of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act. In this case an act of the Legislature of Georgia prescribed the maximum charges which could be made by warehousemen for the handling of tobacco. Under the method of handling tobacco in Georgia, the tobacco was brought to the warehouse by the seller and there sold to buyers, who immediately ship the tobacco to other States. Payment for the tobacco is made to the warehouseman who deducts his charges and remits the balance to the sellers. *The act had no relation whatever to the buying and selling of tobacco and was carefully distinguished by this Honorable Court from the Farmers' Grain Company cases, supra*, by showing that the:

“Georgia act lays no constraint upon purchases in interstate commerce, does not attempt to fix the prices or conditions of purchases, or the profit of the purchasers. It simply seeks to protect the tobacco growers from unreasonable charges of warehousemen and their services to the growers in handling and selling the tobacco for their account.”

This Honorable Court answered the proposition advanced by the petitioner by stating that a State is not permitted to regulate or place a burden upon interstate commerce and further found that the State statute under consideration did not impose such a burden. This Honorable Court said, page 847:

“We find no ground for concluding that the state requirements lay any actual burden upon interstate or foreign commerce. *The Georgia act does not attempt to fix the prices at auction sales or to regulate the activities of the purchasers.* The fixing of reasonable maximum charges for the services of the warehousemen in aid of the tobacco growers does not militate against any interest of those who buy. They pay the bid price, as accepted, and the warehousemen pays the seller, deducting from the purchase price the warehouse charges.” (Emphasis ours.)

This latter quotation clearly differentiates *Townsend v. Yeomans* from the instant case. In the instant case the respondent would be required to pay the milk producers not the agreed price, but the *price fixed by the petitioner*. In addition to the price regulation, the respondent would be required to post a bond conditioned for the payment to the producers of the prices fixed by the petitioner, and would be required to pay license fees. It can readily be seen that the cost of the milk would be increased by these regulations. We respectfully submit that the effect of these regulations and price fixing would be analogous to a *direct tax* on the milk shipped in interstate commerce.

The petitioner cites Section 11e of the Act under consideration, page 46, of its brief, wherein it is stated that milk shipped in interstate commerce shall not be included in the determination of the license fee, provided such milk is actually computed in determining the amount of such license fee in such other State. We respectfully submit this section of

the Act clearly indicates that the Commonwealth did not intend at any time to regulate milk shipped in interstate commerce in any manner whatsoever.

To summarize briefly the distinction between the line of cases relied upon by the petitioner and the cases relied upon by the respondent we quote from the opinion of the learned Chancellor below (R. 29) :

“The distinction between *Munn v. Illinois*, *Townsend v. Yeomans*, and other cases relied upon by the plaintiff, on the one hand, and the *Farmers' Grain Company* cases and the present case, on the other, lies in the fact that in the former *the regulation was confined to warehouses, elevators, or other agencies through which interstate commerce might flow*, but whose activities were entirely intrastate. In the latter cases the statute sought to *regulate the act of purchasing articles which were to be shipped in interstate commerce*, and to prohibit such purchases unless made upon terms prescribed by the statute and by administrative agencies. It is not the milk receiving plant operated by the defendant that the plaintiff seeks to regulate, but the business conducted by the defendant of buying and shipping milk.” (Emphasis ours.)

We respectfully submit that the expression of the learned Chancellor below which we have referred to, *supra*, is a well defined and a clear-cut common sense distinction. We therefore respectfully urge upon this Honorable Court that the line of cases relied upon by the petitioner are distinguishable from the instant case and are of no material value in the disposition of the instant case except to show their distinction.

3.

The desirability of a statute is not the test in determining its enforcibility, if the effect burdens interstate commerce.

However desirable it may be for the Pennsylvania Milk Commission to stabilize the dairy industry, and however necessary it may be for it to regulate the transactions of the respondent and other buyers of milk, similarly engaged to effect this purpose, we contend that the effect of the present statute would be to regulate and to place a burden upon interstate commerce.

The petitioner contends that we should assume the existence of evils justifying the people of the Commonwealth of Pennsylvania in adopting the statute. We respectfully submit that the answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with the Commonwealth of Pennsylvania, but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interest of the people of all the States that are affected.

It is further alleged by the petitioner that the legislation before this Honorable Court is in the interest of the milk producers, and essential to protect them from fraud and to secure payment to them of fair prices for the milk actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce, if legislation of that character is needed. These supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which greatly encroach upon the field of interstate commerce, placed by the Constitution under Federal control.

The right to buy milk for shipment and to ship it, in interstate commerce, is not a privilege derived from State laws

and which the State may fetter with conditions, but is a fundamental right, the regulation of which is committed to Congress and denied to the States by the Commerce Clause of the Constitution.

We respectfully submit that in subjecting the buying for interstate shipment to the conditions and measures of control just shown, the statute directly interferes with and burdens interstate commerce, and is an attempt by the Commonwealth of Pennsylvania to prescribe rules under which an important part of such commerce shall be conducted. We respectfully submit that no State can do this consistently with the Commerce Clause.

The petitioner further contends that if the farmers are underpaid they will be tempted to save the expense of sanitary precautions. There is neither evidence nor presumption that such a situation will result. But, apart from such defects of proof, the evils springing from uncared-for cattle must be remedied by measures of repression more direct and certain than the creation of prices. In addition thereto, our milk inspection laws remedy any potential unsanitary conditions.

The petitioner urges in its brief, page 45, that in many aspects the present law under consideration before this Honorable Court is an inspection law. We respectfully submit that the present act cannot be interpreted as an inspection law in view of a series of acts designed especially for inspection measures.

For the information of this Honorable Court, we respectfully submit that there have been innumerable acts passed covering the period from 1853 to 1935 *prohibiting the sale of impure and unwholesome milk* and prescribing a host of regulations to insure such supply.

Act No. 210, approved July 2, 1935, provides as follows :

1. Definitions.
2. Permit: contents of the application.

3. Refusal, suspension or revocation of permits.
4. Renewal of permits.
5. Agency for issuing permits.
6. Inspection of dairy farms.
7. Designation of milk.
8. Raw milk; handling.
9. Records of receipts of milk.
10. Milk for pasteurization; defined.
11. Milk containers for pasteurization.
12. Pasteurized milk, defined.
13. Cleanliness of containers.
14. Milk plants.
15. Water supply of milk plants.
16. Bacteriological analysis.
17. Milk products.
18. Construction of act.
19. Rules and regulations.
20. Penalties.
21. Destruction of milk unsafe for health.
22. Restraining sale without permit.
23. Constitutional construction.

These *regulation* or *inspection* acts are separate and distinct from the Milk Act of 1937. This latter Act deals exclusively with the fixing of maximum and minimum prices of milk, whereas the former acts deal exclusively with regulations insuring pure and wholesome milk.

It is, therefore, obvious that the Milk Act of 1937 under consideration *cannot* be interpreted to be an *inspection law*. A reference to the Digest of the Pennsylvania Statutes (31 Purdons Statutes, 521-660g) discloses that at present there are many laws in force requiring strict sanitary precautions and providing severe penalties which apply directly to the evils described in the Preamble of the Milk Control Law. All milk producers must comply with these sanitary measures regardless of the price received by them for their milk. The Bureau of Milk Sanitation, Department of Health, Commonwealth of Pennsylvania, is specifically charged with

the duty of enforcing the sanitary regulations affecting the production of milk. This Bureau is separate from the Milk Control Commission and functions under a different set of laws which we have referred to as inspection laws.

The petitioner likewise urges that the act declares it to be the legislative intent that the price prescribed by the Commission for milk produced in this Commonwealth and sold in this Commonwealth for shipment into and sale in another State shall not be destructive of the price structure of producers in such other State. The effect of price fixing upon the price structure of producers in other States, however, is not the criterion. The test is whether the regulation and the price fixing amounts to a regulation of interstate commerce and places a burden upon it. If it does, it is beyond the power of the State and cannot be sustained.

We respectfully submit that the effect of the State statute in the instant case fixing prices as would apply to a sale in interstate commerce is a direct regulation and burden upon said commerce and under the numerous authorities is invalid.

4.

Does the right of a State, under the exercise of its police power, rise above the prerogative of the Federal Government to control interstate commerce, or, at least, exist until the Federal Government exercises some control over the subject matter?

It was contended by the State in the *Farmers' Grain Company* cases, as it is contended here, that the regulations could stand upon the principle which permits the State to make local laws under its police power in the interest and welfare of its people, which are valid although affecting interstate commerce, and stand, at least, until Congress has taken possession of the field under its superior authority to regulate commerce among the States.

We respectfully submit that the proposition advanced by the Commonwealth has no application where the Commonwealth passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it. A State statute which, by its necessary operation, directly interferes with or burdens such commerce, is a prohibited regulation regardless of the purpose for which it was enacted.

In *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 196, the Commonwealth of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted of ferrying passengers and freight between Pennsylvania and New Jersey. This traffic was held to be in interstate commerce. The court held:

"Congress alone, therefore, can deal with such transportation; its nonaction is a declaration that it shall remain free from burdens imposed by state regulation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products and against those of other states. . . . And they may rely on the power of Congress to prevent any interference by the state until the act of commerce, the transportation of passengers and freight, is completed . . ."
(Emphasis ours.)

In *Oklahoma v. Kansas Natural Gas Company*, 221 U. S. 229, the State of Oklahoma attempted to regulate the transportation of natural gas by foreign corporations engaged in interstate commerce. The court held, page 260:

"At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a state, and that it cannot be regulated or restrained by a state, or that a state cannot exclude from its limits a corporation engaged in such commerce. . . . The inaction of Congress is a declaration of freedom from state interference with the trans-

portation of articles of legitimate interstate commerce, and this has been the answer of the courts to the contentions like those made in the case at bar."

In *Missouri v. Kansas Natural Gas Company*, 265 U. S. 298, a Delaware corporation transported gas from Oklahoma to Missouri and sold it to distributing companies in Missouri. The State of Missouri attempted to regulate the activities of the corporation and the corporation defended on the ground that their business was in interstate commerce and hence outside the scope of State regulation, even though Congress has not acted in the field. The court held:

"But the Commerce Clause of the Constitution, of its own force, restrains the states from imposing direct burdens upon interstate commerce. In *Minnesota Rate Cases*, 230 U. S. 352, 396, Mr. Justice Hughes, speaking for the court, said: 'If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which in the absence of federal regulation should be free.' The question is so fully discussed in that case, that nothing beyond its citation is required."

In answer to the petitioner's argument that the milk industry should be regulated by the State in the interest and welfare of the public, we quote from the opinion in the *Missouri* case:

"The contention that, in the public interest, the business is one requiring regulation, need not be challenged. *But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation.* See *Robbins v. Shelby County Tax Industry*, 120 U. S. 489, 493." (Emphasis ours.)

In *Pennsylvania Railroad v. Driscoll*, 198 Atlantic Reporter 130, the court held with respect to the power of a State to make regulations in the absence of Federal regulation:

"When state laws destructively approach this exclusive sphere of federal control, it is then that supervision by the Commerce Clause must become effective, otherwise local regulation will become the rock upon which all interstate commerce power will break."

In *Pennsylvania v. West Virginia*, 262 U. S. 553, the question was whether the State could make conservation regulations of its own resources in the matter of natural gas in interstate commerce, in the absence of Congressional regulation. The court held, page 596:

"By the Constitution, article 1, section 8, clause 3, the power to regulate interstate commerce is especially committed to Congress and therefore impliedly forbidden to the states. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. * * * If there be need for regulating the interstate commerce involved, the regulation should be sought from the body in which the power resides."

We respectfully submit that the language in the *West Virginia* case rules the instant case. Since it is conceded in the instant case that the subject matter is in interstate commerce and if there be need for regulating the interstate commerce involved, the regulation should be sought from the body in which the power resides—Congress.

The Pennsylvania Legislature in adopting the Milk Control Law of 1937 recognized the principle of law which we have established by authority. Section 1202 of the Milk Act provides that no provision of the law shall apply, or be considered to apply to foreign or interstate commerce,

except in so far as the same may be effective in accordance with the Constitution of the United States and the laws of Congress enacted pursuant thereto.

We respectfully submit that under the authorities, the principle of law which we are urging upon this Honorable Court is well settled and we ask this Honorable Court to conclude, in the language of *Missouri v. Kansas Natural Gas Company, supra*:

“But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation.”

5.

The requirement of a bond—its applicability in Pennsylvania as compared to its applicability in the State of New York and other States, as appearing in the brief filed for the Commissioner of Agriculture and Markets of the State of New York as *amicus curiae*.

Section 12 of the Act of April 30, 1936, P. L. 96: 31 Purdons Statutes, Section 684, which Act is known as the Pennsylvania Milk Control Board Law, provides that:

“A license shall not be issued to a milk dealer purchasing milk from producers within this commonwealth unless the milk dealer shall execute and file with the application a personal bond approved by the board, . . . conditioned for the prompt payment by the licensee of all amounts due to producers, under this act and the orders of the board, for milk sold by them to such licensee subsequent to the posting of such bond, upon such terms and conditions as the board may prescribe.”

The interpretation of this section clearly indicates that a milk dealer must post a bond to secure payment to the producers of the *prices fixed by the petitioner*. We call this

to the attention of this Honorable Court as distinguished from the requirements of the filing of a bond to pay the milk producers the *agreed price*.

In the State of New York, Section 258b of the Agriculture and Markets Law entitled Bonds and Enforcement, it is provided that:

“Each milk dealer buying milk from producers for resale or manufacture shall execute and file a bond,
• • • and shall be conditioned for the prompt payment of all amounts due to producers for milk sold by them to such licensee, during the license year.”

We respectfully point out to this Honorable Court that the bond requirement in the State of New York is not conditioned on the payment of prices fixed by the Milk Board but is conditioned upon the payment of the *agreed price* between the milk dealer and the milk producer. There is a vast distinction in legal effect between the requirement of filing a security conditioned for the payment of a price fixed by a State and the payment of a mutual contract price.

On the authority of *Stafford v. Wallace, supra*, it was held that a State statute which sought to regulate the price and profit of such sales which were found to be in interstate commerce was invalid as a violation of the Commerce Clause. The requirement of a filing of a bond under the condition mentioned is similar to the regulation sought to be imposed in *Lemke v. Farmers' Grain Company, supra*, the court in holding the buying and shipping of grain was in interstate commerce, declared the act unconstitutional on the ground:

“That is, the state officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. That this is a regulation of interstate commerce is obvious from its mere statement.”

We respectfully submit that under the authority of the two cases cited, the fixing of prices and the determination

of the profit to be made by milk dealers engaged exclusively in interstate commerce, together with the requirement of a filing of a bond conditioned for the payment of a price fixed by the petitioner is, in the language of the *Lemke* case a "regulation of interstate commerce which is obvious from its mere statement."

The bond requirements of the State of New York do not approximate the bond requirements of the Commonwealth of Pennsylvania and we respectfully submit that a bond conditioned for the payment of an agreed price of a commodity might be enforceable for the protection of the public against fraud but this is quite different from the requirement of the Pennsylvania Act with respect to the bond requirement.

In the case of *Nebbia v. New York*, 291 U. S. 502, the Milk Act of New York was declared constitutional. But we respectfully submit that the licensing, bonding and price fixing of the New York act applied to the milk industry *within* the State of New York. Interstate commerce was not involved in the *Nebbia* case. We therefore conclude that there is a vast legal distinction between the requirement of a filing of a bond in New York for *intrastate* milk and the requirement of a filing of a bond in Pennsylvania for a subject matter in interstate commerce.

The authorities cited in the New York brief sustaining the validity of the bond requirement can rise to no higher level than the decision of *Harrisburg Dairies, Inc., v. The Milk Control Commission*, which opinion was appended to petitioner's brief and marked Appendix A. The bond regulation in Pennsylvania was sustained as a valid police regulation insofar as it applied to intrastate commerce.

We are led to believe, after reading the footnote on page 23 of the New York brief that the Milk Control Law of New York had not proved satisfactory. It appears that the retail milk prices are no longer established by law in New York,

and payments to producers may be fixed by agreement under the New York laws of 1937.

In the instant case the petitioner would seek to regulate the prices and profit of milk shipped in interstate commerce and, in addition, compel us to file bonds conditioned for the payment of the *prices fixed* by the Milk Commission. This type of regulation was ruled invalid in the case of *United States v. Seven Oaks Dairy Company, supra*, wherein it was stated:

“And where the business involved interstate commerce, state statutes regulating prices have been declared invalid as a direct burden upon interstate commerce.”

With respect to the bonding requirements in other jurisdictions cited in the New York brief, the State of Vermont does not require the filing of bonds conditioned for the payment of prices fixed by the Milk Commissioners. The requirements of a bond for milk dealers in the State of Vermont is practically the same as the requirement in the State of New York.

The State of California provides for milk bonding which is conditioned for the payment of amounts due producers. The amount of the bond is determined by the quantity of milk purchased by a distributor and not by the prices fixed by the Milk Commission.

The State of Indiana provides for a milk bond conditioned for the prompt payment of all obligations to producers when due. This likewise is similar to the New York Act.

The Commonwealth of Massachusetts provides for milk bonds conditioned upon the prompt payment of all amounts due to producers for milk or cream sold by them to the licensee during the period for which the application for license is made.

The State of Minnesota provides for a milk bond similar to the one provided for in Massachusetts.

The State of New Hampshire provides for a milk bond similar to the one in the State of Minnesota.

The State of New Jersey provides for a milk bond similar to the one in the Commonwealth of Massachusetts.

The State of Wisconsin provides for a milk bond similar to the one in the State of New York.

In Canada, the Province of Ontario, provides for a milk bond similar to that of New York.

We respectfully submit that the bonding requirements in the States enumerated above, all require the filing of milk bonds conditioned for the prompt payment to producers of the agreed amounts owing to the producers. This is quite different from the requirements of the milk bond in the instant case, where the condition of the bond is determined by the *price of milk fixed by the Milk Commission*.

The case cited in the New York brief of *E. Pat Kelly v. The State of Washington*, 302 U. S. 1, is clearly an inspection measure as has been determined by this Honorable Court.

The other points raised in the New York brief have been carefully discussed in our brief and it is unnecessary to take up these matters again in answering the New York brief.

We respectfully submit that the legal distinction between the requirements of a bond under the Pennsylvania Act and the requirements of a bond under the Act of New York and other sister States is based on the lack of the *price fixing feature* as a condition of the bond. We urge upon this Honorable Court that the price fixing feature as it appears in the bond requirement in the Milk Act of the Commonwealth of Pennsylvania is a direct burden upon interstate commerce, and under the authorities cited, contravenes the Commerce Clause, and is invalid.

Conclusion.

We respectfully submit that the right to regulate interstate commerce in the milk industry of the United States is exclusively vested in Congress. If the Commonwealth of Pennsylvania were permitted to make its own regulations concerning interstate commerce, the other forty-seven States would do likewise, and the milk industry of the United States would become unstabilized to the detriment of the dairy farmer and consuming public.

We would then find ourselves back to the time of the Constitutional Convention when each State wanted to be free and independent and not subject to a national body, which would have exclusive jurisdiction over matters of national importance.

We respectfully submit that the development of this country has been built on several forces. One of them has been its vast free market. If we were now to turn back the clock one hundred and fifty years and were to break the country into forty-eight small markets, and even hundreds of smaller markets, the end of our progress is in sight.

In conclusion, we respectfully ask this Honorable Court to sustain the principle of law enunciated in the opinion of the learned chancellor below which was based on the *Farmers' Grain Company* cases and related cases, *supra*, and sustained by the Supreme Court of Pennsylvania.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 426.

**MILK CONTROL BOARD OF THE COMMON-
WEALTH OF PENNSYLVANIA,**

Petitioner,

against

**EISENBERG FARM PRODUCTS, a
Pennsylvania Corporation,**

Respondent.

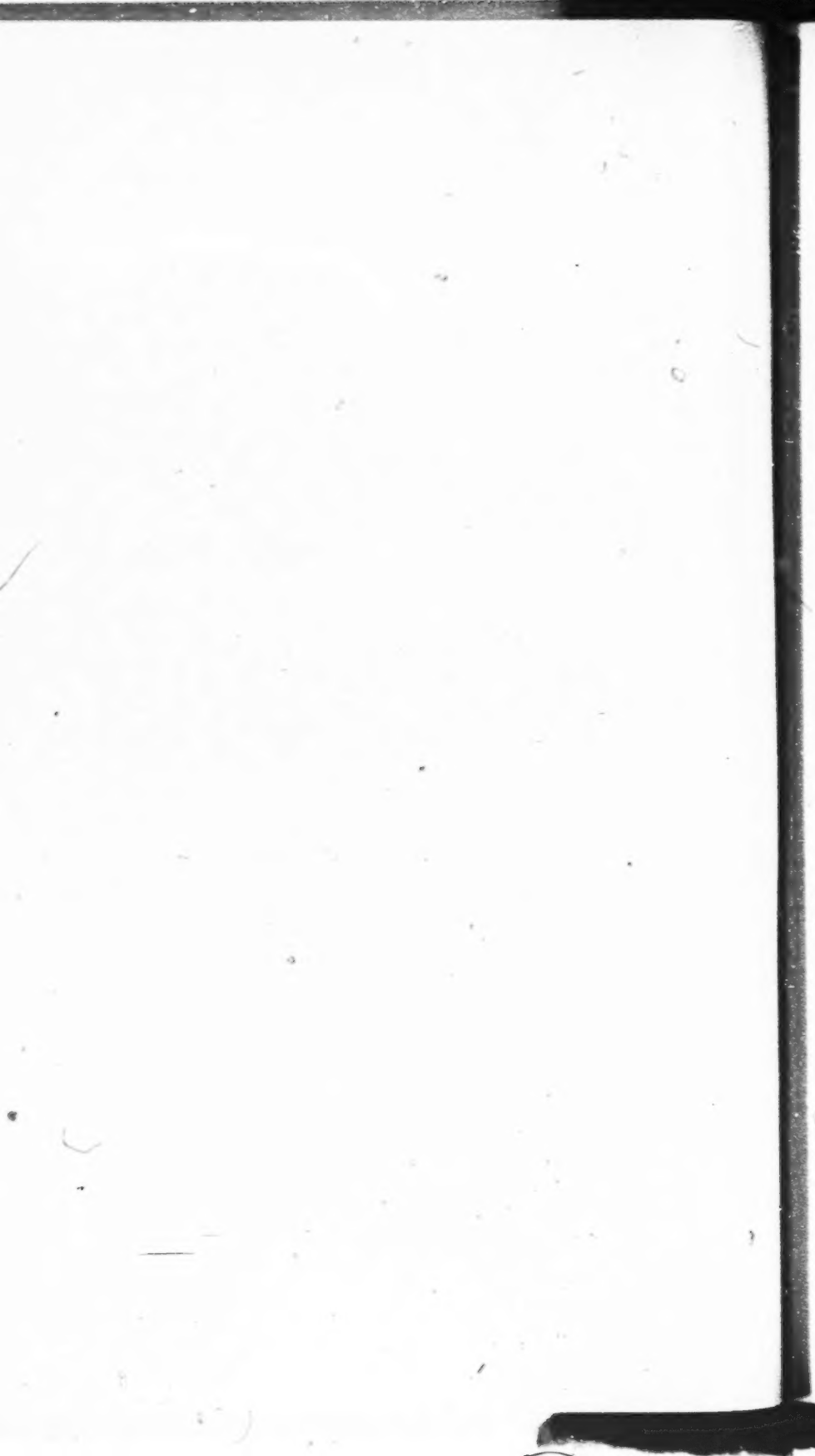
**PETITION AMICUS CURIAE OF COMMISSIONER
OF AGRICULTURE AND MARKETS OF THE
STATE OF NEW YORK IN SUPPORT OF WRIT
OF CERTIORARI.**

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Pennsylvania Corporation.

PETITION AMICUS CURIAE OF COMMISSIONER
OF AGRICULTURE AND MARKETS OF THE
STATE OF NEW YORK IN SUPPORT OF WRIT
OF CERTIORARI.

*To the Honorable Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

Your petitioner, the Commissioner of Agriculture and Markets of the State of New York, respectfully urges favorable consideration of the petition for a writ of certiorari in the above entitled case, now pending before this Honorable Court.

The appeal involves the right of a state to require a milk dealer buying milk at its plant within the state from producers within the state to obtain a milk dealer's license, file a bond guaranteeing payments to such producers and to pay at least the prescribed minimum

price, when the milk so purchased is transported into another state for distribution and sale.

The Commissioner of Agriculture and Markets of the State of New York is vitally interested in this appeal and so are New York State's thousands of milk producers. As early as 1913 the New York Legislature passed a law providing for the licensing of milk gathering stations. (Chapter 408 N. Y. Laws of 1913.) In 1915 this statute was amended to provide for the filing with the application for license of a "good and sufficient surety bond." (Chapter 651 New York Laws of 1915.) Although amended from time to time, the bonding law has continued down through the years. It is currently found as section 258-b of the Agriculture and Markets Law and in many ways is similar to the Pennsylvania bonding requirements.

In its present form the New York statute provides:

"§258-b Bonds and enforcement.

1. Each milk dealer buying milk from producers for resale or manufacture shall execute and file a bond, unless relieved therefrom as hereinafter provided. The bond shall be upon a form prescribed by the commissioner, shall be in the sum fixed by him, but not less than two thousand dollars, shall be executed by a surety company authorized to do business in this state, and shall be conditioned for the prompt payment of all amounts due to producers for milk sold by them to such licensee, during the license year. The bond shall be approved by the commissioner.

"2. Upon default by the milk dealer in any conditions of the bond, if there is reason to believe that the milk dealer owes for milk purchased from producers, the commissioner shall give reasonable notice to file verified claims, and may if he deems it advisable fix a reasonable time within which such claims must be filed. The commissioner shall

examine claims so filed and by certificate determine the amounts due upon them. The commissioner may bring an action upon the bond, and for the purposes of such action the certificate determining the amounts due shall be presumptive evidence of the facts therein stated. If the recovery upon the bond is not sufficient to pay all claims as finally determined, then it shall be divided *pro rata* among them.

"3. A milk dealer shall from time to time, when required by the commissioner, make and file a verified statement of his disbursements during a period to be prescribed by the commissioner, containing the names of the producers from whom milk was purchased, and the amount due to the producers thereof. If it appears from such statement or from facts otherwise ascertained by the commissioner that the security afforded to producers selling milk to such milk dealer by the bond does not adequately protect such producers, the commissioner may require such milk dealer to give an additional bond in a sum to be determined by the commissioner, but not more than double the value of the maximum amount of milk purchased from producers in any one month, and not exceeding in any event one hundred thousand dollars.

"4. The provisions of this article relative to a milk dealer buying milk from producers for resale or manufacture shall apply also to a milk dealer buying milk from a co-operative association or buying milk from another milk dealer or handling milk for or in conjunction with another person or persons, whenever protection by bond or otherwise is directed by the commissioner to protect the interests of producers.

"5. If the applicant for a license under this section be a natural person or a domestic corporation, the commissioner may, if satisfied from an investigation of the financial condition of the applicant that the applicant is solvent and possessed of sufficient assets to reasonably assure compensa-

tion to probable creditors, relieve such person or corporation by order from the provisions of this section requiring the filing of a bond until otherwise directed. The commissioner may require, as a condition for so relieving such person or corporation from filing a surety bond, that cash be deposited with a bank or trust company, or bonds of the United States or state of New York be deposited with the director, under such terms as will in his opinion afford producers the protection intended by this section.

"6. Bonds for the license year commencing April first nineteen hundred thirty-five and for subsequent years shall be filed with the applications."

New York's bonding law has been held constitutional by the state's highest court. *People v. Perretta*, (1930 [253 N. Y. 305]; *People v. Beakes Dairy Co.*, (1918) [222 N. Y. 416]. And in *Ten Eyck v. Eastern Farm Products, Inc.* (249 A. D. 891), the Appellate Division of the Third Judicial Department of the New York Supreme Court, citing *People v. Perretta, supra*, declared that "The right of the plaintiff* to require a bond is unquestionable."

In *Pyrke v. Brudno*, (269 N. Y. 652 aff. 243 A. D. 493) the Court of Appeals, without opinion, affirmed an Appellate Division decision holding that a corporate "selling agent" as assignee of the producers it represented in the sale of milk "is entitled to the full protection" of the required statutory bond.

In 1933 New York's Legislature, after an exhaustive investigation (1933 Legis. Doc. 114), passed the Milk Control Law. (Chapter 158 of the Laws of 1933.) In *Nebbia v. New York*, (291 U. S. 502) the first constitutional attack (unsuccessful in its result) was made

*The Commissioner of Agriculture and Markets of the State of New York.

upon that legislation. Mr. Justice Roberts, writing the opinion of this court, observed (p. 521):

"Save the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry. Legislation controlling it in the interest of the public health was adopted in 1862 and subsequent statutes have been carried into the general codification known as the Agriculture and Markets Law. A perusal of these statutes discloses that the milk industry has been progressively subjected to a larger measure of control. The producer or dairy farmer is in certain circumstances liable to have his herd quarantined against bovine tuberculosis; is limited in the importation of dairy cattle to those free from Bang's disease; is subject to rules governing the care and feeding of his cows and the care of the milk produced, the condition and surroundings of his barns and buildings used for production of milk, the utensils used, and the persons employed in milking (§§ 46, 47, 55, 72-88). Proprietors of milk-gathering-stations or processing plants are subject to regulation (§54), and persons in charge must operate under license and give bond to comply with the law and regulations; must keep records, pay promptly for milk purchased, abstain from false or misleading statements and from combinations to fix prices (§§ 57, 57 a, 252)."

See also *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U. S. 194 at 205.

This appeal is not a case where, as in *Baldwin v. G. A. F. Seelig* (294 U. S. 511), title to the milk purchased passed at the creamery in one state and subsequently the milk was transported to, for sale in, New York State to which it was barred because producers of the former state were paid a purchase price below the minimum officially fixed by New York for milk purchased, under similar conditions, from its producers.

In this appeal title to the milk passes in Pennsylvania (R. 16), which requires security for payment to its own producers.

According to the Division of Milk Control of your petitioner's Department of Agriculture and Markets, there are on file for the current license period ending March 31, 1939, 415 surety bonds representing a guarantee for milk purchased of \$2,124,800.00; 160 depository agreements of a value of \$303,594.06 and 32 Federal and New York State government bonds worth \$132,018.75; in all, a total security for milk purchased during the present license year of \$2,560,412.81. New York's producers are vitally concerned.

In many essential respects Pennsylvania's Milk Control Act follows the New York Milk Control Law. *Rohrer v. Milk Control Board* (322 Pa. 257.) Conditions, generally, in the dairy industry are much the same. But if the Pennsylvania decision herein prevails, it is not improbable that the security on file with your petitioner will be impaired, since many metropolitan milk dealers now buying from producers in upstate New York ship the milk via railroad or motor truck through Pennsylvania and New Jersey into New York City. Milk purchased from New York producers at plants within New York State is also shipped to Pennsylvania, New Jersey and New England markets.

It is therefore respectfully submitted that it is of foremost importance to the State of New York to preserve those established factors of assured payment which long experience has taught keep open the flow of pure, wholesome milk from farm to city.

WHEREFORE, the undersigned, as Commissioner of Agriculture and Markets of the State of New York, respectfully prays that the petition be granted.

Albany, New York, November 4, 1938.

HOLTON V. NOYES,
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**CHARLES ELMORE CROPLEY
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Respondent.

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AND MARKETS OF THE STATE OF NEW
YORK AS AMICUS CURIAE.**

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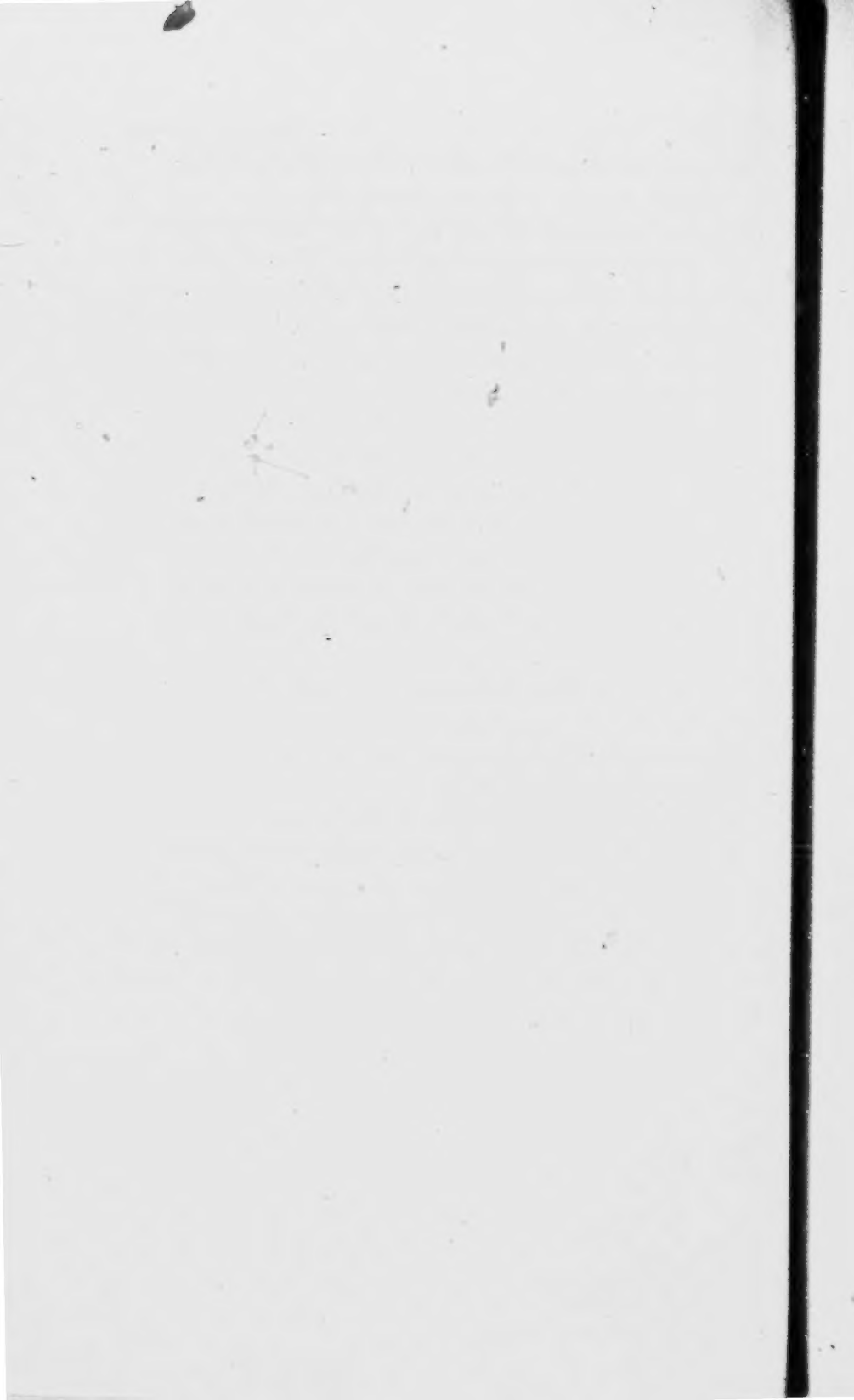
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Supreme Court of the United States

October Term, 1938.

No. 426.

**MILK CONTROL BOARD OF THE COMMON-
WEALTH OF PENNSYLVANIA,**

Petitioner,

against

**EISENBERG FARM PRODUCTS, a
Pennsylvania Corporation,**

Respondent.

BRIEF FOR COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK AS AMICUS CURIAE.

On November 21, 1938, this Honorable Court granted the Pennsylvania Milk Control Board's petition for a writ of certiorari to review the order of the Supreme Court of Pennsylvania dated June 30, 1938 (200 Atlantic 254; R. 32). The appeal presents the question whether "a State statute regulating the milk industry by requiring that all milk dealers obtain a license, file a bond for the protection of farmers, and pay to farmers minimum prices prescribed by an administrative agency (or any one of said requirements) be enforced against a milk dealer buying milk at its plant within the State from farmers located therein for shipment to another State" (Petition, p. 2).

Importance of the Appeal to New York State.

The statute is severable (Section 1201, Act of April 28, 1937) and divides itself into three prominent phases, (1) Licensing (2) Bonding and (3) Price Fixing. The vital interest of the Commissioner of Agriculture and Markets, as official representative of New York's thousands of milk producers, is at this time centered in the bonding issue.* For years, New York milk producers have had the protection of a bonding law which is closely resembled in its essence by the relevant provisions of the Pennsylvania statute. As Section 258-b of the Agriculture and Markets Law (N. Y.) it provides:

§258-b. Bonds and enforcement

"1. Each milk dealer buying milk from producers for resale or manufacture shall execute and file a bond, unless relieved therefrom as hereinafter provided. The bond shall be upon a form prescribed by the commissioner, shall be in the sum fixed by him, but not less than two thousand dollars, shall be executed by a surety company authorized to do business in this state, and shall be conditioned for the prompt payment of all amounts due to producers for milk sold by them to such licensee, during the license year. The bond shall be approved by the commissioner.

"2. Upon default by the milk dealer in any conditions of the bond, if there is reason to believe that the milk dealer owes for milk purchased from producers, the commissioner shall give reasonable notice to file verified claims, and may if he deems it advisable fix a reasonable time within which such claims must be filed. The commissioner shall examine claims so filed and by certificate de-

*Affected with a public interest, the production and distribution of milk is a paramount industry of the State. *Nebbia v. New York*, 291 U. S. 502, 517. New York ranks third among the states in the production of milk and second in the value of dairy products—Report of the Joint Legislative Committee to Investigate the Milk Industry, N. Y. Legis. Doc. 114 of 1923; 3rd, production, 1937, Crops and Markets, U. S. Dept. of Agric. Feb. 1938, p. 23; 2nd, cash farm income, 1937, U. S. Dept. of Agric., Bureau of Agric. Economics, titled "Gross Farm Income and Government Payments", p. 15.

termine the amounts due upon them. The commissioner may bring an action upon the bond, and for the purposes of such action the certificate determining the amounts due shall be presumptive evidence of the facts therein stated. If the recovery upon the bond is not sufficient to pay all claims as finally determined, then it shall be divided *pro rata* among them.

"3. A milk dealer shall from time to time, when required by the commissioner, make and file a verified statement of his disbursements during a period to be prescribed by the commissioner, containing the names of the producers from whom milk was purchased, and the amount due to the producers thereof. If it appears from such statement or from facts otherwise ascertained by the commissioner that the security afforded to producers selling milk to such milk dealer by the bond does not adequately protect such producers, the commissioner may require such milk dealer to give an additional bond in a sum to be determined by the commissioner, but not more than double the value of the maximum amount of milk purchased from producers in any one month, and not exceeding in any event one hundred thousand dollars.

"4. The provisions of this article relative to a milk dealer buying milk from producers for resale or manufacture shall apply also to a milk dealer buying milk from a co-operative association or buying milk from another milk dealer or handling milk for or in conjunction with another person or persons, whenever protection by bond or otherwise is directed by the commissioner to protect the interests of producers.

"5. If the applicant for a license under this section be a natural person or a domestic corporation, the commissioner may, if satisfied from an investigation of the financial condition of the applicant that the applicant is solvent and possessed of sufficient assets to reasonably assure compensation to probable creditors, relieve such person or corporation by order from the provisions of this section requiring the filing of a bond until otherwise di-

rected. The commissioner may require, as a condition for so relieving such person or corporation from filing a surety bond, that cash be deposited with a bank or trust company, or bonds of the United States or State of New York be deposited with the director, under such terms as will in his opinion afford producers the protection intended by this section.

"6. Bonds for the license year commencing April first, nineteen hundred thirty-five and for subsequent years shall be filed with the applications."

There are on file for the license period commencing April 1, 1938 and ending March 31, 1939, 415 surety bonds representing a guarantee of \$2,124,800.00; 160 depository agreements testifying to segregated bank deposits of a value of \$303,594.06 and 32 approved Federal and State Government bonds worth \$132,018.75. All of these protect producers selling milk by a total guarantee of \$2,560,412.81. Of course, all of the milk purchased does not cross state lines. Nevertheless, because many metropolitan dealers buying milk at up-state plants ship (by rail or truck) through Pennsylvania or New Jersey, or both, into New York City, state lines are crossed.* Milk is also shipped from New York State plants, where purchased from New York State producers, to New England markets. Unfortunately, the Commissioner of Agriculture and Markets is unable to offer exact figures or percentages as to

*According to "Statement Concerning the New York Metropolitan Milk Market and the Proposed Marketing Agreement" prepared by the Dairy Section, Division of Marketing and Marketing Agreements of the Agricultural Adjustment Administration (page 8) "Over 22 percent of all milk received at the market from approved plants passed through plants in New York State but was transported across State lines between the plant and the market." This was for the period December, 1936-November, 1937. The statement was received in evidence as Exhibit 8, Paul L. Miller, Witness, Stenographic Report of Hearing held at Albany, New York, May 16, 1938, on the proposed Marketing Agreement and Order regulating the handling of milk in the New York Metropolitan Milk Marketing Area, now Order No. 27 issued by the Secretary of Agriculture, August 8, 1938, pursuant to Public Act No. 10, 73 D Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

amounts of milk shipped to other states. The fact, itself, however, may not be denied.*

In New York the Bonding Law has been held constitutional**, but in Pennsylvania a similar requirement has been found to be "a burden upon interstate commerce" and therefore unconstitutional (R. p. 24). But any "burden" is not enough to invalidate the act. It must be an undue, and unreasonable one. It must be unnecessary and place an unreasonable restraint. For as was said in *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 225:

"It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines."

However, if on this appeal the Pennsylvania determination is finally upheld, then, in so far as the bonding feature is involved, the outcome affects New York State.

History of the New York Bonding Law.

In 1913 the Agricultural Law was amended by adding a new section (§ 55) providing for the licensing of persons or corporations conducting the business of buying milk from dairymen for shipment as fluid or for manufacture into butter (Chapter 408 N. Y. Laws

*Dealers with a principal office or place of business outside New York State buying milk from producers of this State have on file with the Commissioner bonds of a total value of \$250,000. Nearly all of them have filed bonds since the enactment of the law.

Pennsylvania State College Bulletin, 337 (School of Agriculture and Experiment Station), published April, 1934, at p. 78 recites that in the month of April, 1934, 3,528,000 lbs. milk equivalent of milk and cream were shipped from New York to Pennsylvania dealers.

**As to corporations—*People v. Seakes Dairy Company*, 222 N. Y. 416.
As to individuals—*People v. Perretta*, 253 N. Y. 306.

1913). As originally enacted no provision was made for guaranteeing payment to producers for the milk purchased. Enlarging upon Section 55, requirement of "a good and sufficient surety bond" became law two years later.* (Chapter 651 N. Y. Laws 1915; Report of the Pitcher Committee, N. Y. Legis. Doc. No. 114 of 1933 at page 360.)

The original bill (as to the bonding provision) was introduced in the Assembly on March 9, 1915 (Assembly Journal 1915, p. 785). It seems to have been referred to the Committee on Agriculture, amended, (p. 1427), recommitted, reported amended, (pp. 1656, 1992), again amended (p. 2108) and on April 19th. unanimously passed (pp. 2388, 2389). On April 22nd. the Senate unanimously passed it (Senate Journal 1915, p. 1615). On May 18th. it was approved by the Governor. This brief reference to its legislative career indicates, we think, a careful consideration of its merits

*As it appeared at that early date, the pertinent portion of the section read:

A license shall not be issued as provided in this section, on and after the taking effect of this section, unless the applicant for such license shall file with the application a good and sufficient surety bond, executed by a surety company, duly authorized to transact business in this state, in a sum not less than five thousand dollars, or shall be relieved from such requirement as provided herein. Such bond shall be approved as to its form and sufficiency by the commissioner of agriculture.

Such applicant may in lieu of such bond deposit with the commissioner of agriculture money or securities in which the trustees of a savings bank may invest the moneys deposited therein, as provided in the banking law, in an amount equal to the sum secured by the bond required to be filed as herein provided.

The bond required to be filed hereunder shall be given to the commissioner of agriculture in his official capacity and shall be conditioned for the faithful compliance by the licensee with the provisions of this chapter, as hereby amended, and for the payment of all amounts due to persons who have sold milk or cream to such licensee, during the period that the license is in force. The money or securities deposited with the commissioner of agriculture, as above provided, shall constitute a separate fund and shall be held in trust for, and applied exclusively to, the payment of claims against the licensee making such deposit, arising from the sale of milk or cream to such licensee.

Upon default by the licensee in the payment of any money due for the purchase of milk or cream, which payment is secured by a bond or the deposit of money or securities as hereinbefore provided for, the creditor may file with the commissioner of agriculture, upon a form prescribed by him, a verified statement of his claim. If such creditor shall have reduced such claim to judgment or shall thereafter and before the commencement of the action by the commissioner of agriculture, as hereinafter provided for, reduce such claim to judgment, a transcript of such judgment shall also be filed with such commissioner.

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by a public body having complete facilities for investigation. The Legislature must be presumed to have recognized an urgent evil, and indeed subsequent events have proven the statute's worth.

The bond requirement was soon attacked as unconstitutional. In June of 1916 the People had begun under amended Section 55 an action for injunction against the Beakes Dairy Company (222 N. Y. 416). The defendant demurred, raising the question of unconstitutionality. We mention the case at this point because when it came on to be heard by the Court of Appeals, the Attorney General filed a brief which explained the reason and necessity for the bonding amendment. It was urged (p. 32) that "some milk gatherers who ship their milk to cities may be honest and will pay the farmer for his milk, nevertheless it has been proved that frauds have been perpetrated to such an extent throughout the State and upon a particular class of persons as to justify a licensing and bonding restriction of general application even though milk gathering seems at first glance to be an ordinary business not more susceptible to fraud than many others". By way of proving this conclusion, the Attorney General had illustrated losses which occurred in a single county of the State. In order to demonstrate that they were not imaginary, we quote from pages 26 and 27 of the brief. (*People v. Beakes Dairy Company*. Cases and Briefs. New York Court of Appeals, 222 N. Y. 410-437. New York State Law Library, State Education Bldg., Albany, N. Y.).

"Taking the county of Delaware alone, the following milk gathering concerns ceased to do business, owing the farmers in the vicinity the amount thereafter set forth:

"The Shavertown Creamery Company at Shavertown, Delaware county, ceased business owing the farmers in the neighborhood who supplied milk to the company the sum of \$15,000.

"Henry Huebe, a New York City dealer, operated a creamery or purchased milk in the town of Walton and ceased doing business owing the farmers \$5,000.

"J. J. Clancy, also from New York, operated a creamery at Frasers, and stopped business owing the farmers \$8,000.

"The Metropolitan Dairy Company, with headquarters in New York, operated a creamery at Colchester and shut down its plant owing the farmers \$7,000.

"Louis Kadans, a New York dealer, operated creameries at Arkville and left owing the farmers \$10,000.

"Walker & Mead of Shavertown failed with liabilities of \$5,000.

"G. E. Manzer closed his creamery at Sidney Center owing the farmers \$9,000.

"Franklin Creamery Company at Franklin, Delaware county, left liabilities of \$9,000 for milk purchased.

"The Dairy Products Company, with its principal creamery at Bainbridge, ceased business owing the farmers an amount approximately \$50,000.

"William Stringer of Treadwell, Delaware county, owed the farmers when he failed \$3,000 or \$4,000.

"E. E. Sweet Creamery Company of Sidney failed owing the farmers a considerable amount for milk.

"The Liberman Dairy Company, New York dealers operating in Delaware county, whom the State is now suing, owes the farmers \$15,000.

"Fraudulent and unscrupulous buyers abounded everywhere, and though the farmer could have saved himself from fraud and loss by refusing to sell except for cash, it still was within the legislative power to protect a great class of people from the follies of their own ignorance (*Dent v. Virginia*, 129 U. S. 114, 122)."

Milk continued to disturb the legislative mind. During the session of 1916 the New York Senate and Assembly adopted a joint resolution appointing a joint legislative committee to investigate the condition of the State's agriculture. Because Senator Charles W. Wicks was chairman, the committee was commonly referred to by his name. Under date of February 15, 1917, a preliminary report was made. (Joint Legis. Comm. on Dairy Products, Live Stock and Poultry, N. Y. Legis. Doc. No. 35 of 1917.) After commenting that the enactment of the law "was induced by the common knowledge that dairymen in many sections of the State from time to time, became the prey of men without financial responsibility, who could secure for a time, possession and control of a shipping station," or could "suffer tremendous losses because of the honest failure of men engaged in business," the report said (p. 607):

"If a survey could be made extending back fifteen years, it would probably be difficult to find a county in the State where the dairymen have not lost many thousands of dollars from such operations. The failure to receive any pay for milk produced for as long a period as two or three months has been very frequent. Such a result is a disaster of considerable magnitude to the ordinary farming community. The loss to the owner of the farm

is serious enough, but the situation of the tenant farmer dependent for his daily bread upon the milk check, is far more so when the milk company becomes insolvent or the fraudulent operator disappears with the proceeds of two or three months' milk. This situation is too well known to require extended comment."

It is impossible, however, for the producer to sell his milk for cash since the custom in the industry is to buy now and pay later on the basis of utilization. For as was said by Mr. Justice Pound in *People v. Perretta* (253 N. Y. 305 at 310):

"It is apparently recognized as impracticable that the payments should be made to the farmer upon the delivery of each sale of milk." * * *

"The producer of milk for the city market desires to find a ready purchaser near at hand to take his product from the source of supply to the point of consumption. He cannot peddle his product from door to door or hold it to await a rise in market prices or a cash purchaser. He must sell it to milk gatherers; deliver it fresh and often on credit. Such are the conditions of the market peculiar to the handling of milk."

The bonding statute was indeed an agency for good. That it produced commendable results is evidenced by the annual report of the Department of Agriculture and Markets transmitted to the Governor and the Legislature for the calendar year 1929 (N. Y. Legis. Doc. No. 37 of 1930). The following table appearing at page 34 of that report shows the number of defalcations, the amount of claims and the monies collected for and distributed to producers over the period 1918-1929.

Year	Number of forfeitures	Total amount producers' claims	Amount paid on claims
1918.....	1	\$ 1,767.25	\$ 1,767.25
1920.....	1	22,970.07	22,970.07
1921.....	5	62,973.18	42,245.33
1924.....	1	18,318.48	5,000.00
1925.....	1	18,132.22	5,000.00
1927.....	2	7,906.57	7,013.18
1928.....	5	20,830.62	15,966.78
1929.....	5	46,827.12	17,176.81
		<hr/> \$199,725.51	<hr/> \$137,139.42"

At page 11 of his brief filed with the Court of Appeals in the Perretta case, *supra*, the Attorney General having previously directed attention to the losses set forth for Delaware County in the Beakes case, *supra*, observed with respect to the table above: (Cases and Briefs, New York Court of Appeals, 253 N. Y. 305-324, New York State Law Library, State Education Building, Albany, N. Y.)

"This table covers the years 1918 to 1929, both inclusive, and therefore covers a period of twelve full years. It appears therefrom that in these twelve years there have been but twenty-one forfeitures upon bonds, and that the producers have suffered a loss of but approximately \$60,000, where they would have lost very nearly \$200,000 without the protection of the statute. Furthermore, this is for the entire State of New York. It shows that for the entire State the loss is but slightly more than the amount admitted by the attorney for the Beakes Dairy to have been the loss for the County of Delaware alone, during a period prior to the enactment of the statute."

During the year 1922, section 55 of the old Agricultural Law was transferred to the Farms and Markets Law, becoming Article 21 thereof. (Ch. 48 N. Y. Laws of 1922.) No change was made in the bonding provision as quoted by footnote at page 6 herein, except

that the "Commissioner of Agriculture" was discontinued and mention is thereafter made merely to the "Commissioner." In 1927, the title of the "Farms and Markets Law" was amended to that of "Agriculture and Markets" (Ch. 207 N. Y. Laws of 1927). By chapter 416 of the laws of that year, Article 21 was amended. The bonding provisions then appeared as section 252 and 253. These were the sections under attack in the Perretta case, *supra* (1930). They read as follows:

"§ 252. *Definition; licenses; application.* When used in this chapter, the terms 'milk gathering station,' 'manufactory' or 'plant' shall include a place where milk or cream is received from producers for sale or resale or for manufacture, with or without facilities or equipment for the preparation of milk or cream for market or for manufacture; and shall also include an office or other place of business where milk or cream is purchased from producers for sale or resale or for manufacture, with or without physical facilities in connection therewith for the receiving or the physical handling of milk or cream.

"No person or corporation buying milk or cream from producers shall operate a milk gathering station, manufactory or plant where milk or cream is received or purchased from producers for sale or resale, or for manufacture, unless licensed by the commissioner. Application, upon a form prescribed by the commissioner, shall be made on or before August first in each year, for the license year beginning September first following. The applicant shall satisfy the commissioner of his or its character, financial responsibility and good faith in seeking to operate a milk gathering station, manufactory or plant. The commissioner if so satisfied shall issue to such applicant, on payment of ten dollars, a license entitling the applicant to operate milk gathering stations, manufactories or plants within the state until the first day of September next following. The license may des-

ignate the place or places where such milk gathering stations, manufactories or plants are to be operated. A license shall not be issued unless the applicant shall execute and file with the application a bond, or shall be relieved from filing of bond as provided in the next section."

"§ 253. *Bond; form; enforcement of.* The bond required by the last section shall be upon a form prescribed by the commissioner, shall be in the sum of not less than five thousand dollars, shall be executed by a surety company authorized to do business in this state, and shall be conditioned for the faithful compliance by the licensee with the provisions of this chapter, and for the prompt payment of all amounts due to producers who have sold milk or cream to such licensee, during the period that the license is in force. The bond shall be approved by the commissioner.

"Upon default by the licensee in the payment of any money due for the purchase of milk or cream, the creditor may file with the commissioner, upon a form prescribed by him, a verified statement of his claim. If such creditor shall have reduced such claim to judgment or shall thereafter reduce such claim to judgment, a transcript of such judgment shall also be filed with the commissioner.

"Upon default by the licensee in any of the conditions of the bond, an action upon the bond shall be brought by the commissioner. All moneys collected upon such bond shall be applied by the commissioner, first, to the payment ratably of all verified claims promptly filed with the commissioner after reasonable notice to present claims arising during the license period in connection with which the bond was given and the balance shall be paid into the state treasury.

"A licensee shall from time to time, when required by the commissioner, make and file with the commissioner a verified statement of his or its disbursements during a period to be prescribed by the commissioner, containing the names of the producers from whom milk and cream were pur-

chased, and the amount due to the vendors thereof. If it appears from such statement or from facts otherwise ascertained by the commissioner that the security afforded to producers selling milk and cream to such licensee by the bond does not adequately protect such producers, the commissioner may require such licensee to give an additional bond in a sum to be determined by the commissioner, but not exceeding by more than twenty-five per centum the value of the maximum amount of milk and cream purchased from producers in any one month, and not exceeding in any event one hundred thousand dollars.

"If the applicant for a license under this section be a person or a domestic corporation, the commissioner may, if satisfied from an investigation of the financial condition of the applicant that the applicant is solvent and possessed of sufficient assets to reasonably assure compensation to probable creditors, by an order filed in the department, relieve such person or corporation from the provisions of this section requiring the filing of a bond."

In 1934 (one year after the enactment of the emergency milk control statute of 1933*) the bonding provisions of sections 252 and 253 were combined with the licensing features of Article 25 to create the present Article 21 (Ch. 126 N. Y. Laws of 1934 as incidentally amended by ch. 401, 1935, and ch. 409, 1937).

From almost the beginning of this long history of protective legislation bonds have been required from out of state milk dealers purchasing milk from New York producers.

Official Interpretation of Statute.

Throughout this extended period those charged with the administration of the law officially interpreted it as

*Article 25, Agriculture and Markets Law. See *Nebbia v. New York*, 291 U. S. 502, 515 and footnotes pages 515 and 519.

applicable to all milk dealers buying milk within the State from New York producers. In the September 1918 issue of "Foods and Markets", published monthly by the then Division of Foods and Markets of the Department of Farms and Markets, the following explanation appears at page 15:

"Milk Dealers are Bonded"

"All persons, firms, or corporations who purchase milk from farmers for shipping to a city or manufacturing are required to obtain a license at a cost of ten dollars and file a surety company bond or other security satisfactory to the Commissioner of Foods and Markets."

In the December 1920 issue of "Foods and Markets", the Division published (p. 9) a "List of Licensed Milk Dealers", arranged by counties. In Rensselaer County, (p. 23) of five dealers listed, one is out state dealer. This is not true of every county given, but, of course, there were in other counties dealers shown having out of state addresses. We refer to H. P. Hood & Sons, Inc., because that corporation still files a bond and, according to department records, has done so since 1917.

<i>"Name of Dealer"</i>	<i>Address</i>	<i>Milk gathering stations</i>
RENSSELAER COUNTY		
H. P. Hood & Sons Inc.	494 Rutherford Ave., Charlestown, Mass.	Eagle Bridge West Hoosick Hoosick
Hoosick, N. Y. Elgin System Creamery Association	Hoosick, N. Y.	
Normanskill Farm Dairy Co.	120 South Swan St., Albany, N. Y.	Berlin
Sheffield Farms Co., Inc.	524 West 57th St., New York City	Nassau Stephentown
D. Whiting & Sons	Greenwich, N. Y.	Johnsonville."

New York Decisions.

The first test of the New York requirement was in the case of *People of the State of New York v. Beakes Dairy Company*, 179 A. D. 942; 222 N. Y. 416. The State brought suit to recover judgment for violations of Section 55 of the Agricultural Law on the ground that the defendant was buying milk from producers for shipment to New York City without first having obtained a license from the Commissioner of Agriculture. The Special Term denied defendant's application for judgment upon its demurrer whereby two questions were raised: (1) the constitutionality of the statute and (2) that no civil penalty action was provided by the statute. The State sought judgment against defendant for two hundred and ninety-eight penalties of one hundred dollars each.

The Appellate Division of the Third Judicial Department reversed the Special Term "on the ground that the purpose of the statute is to secure payment for the purchase price of merchandise, and is class legislation and not a valid exercise of the police power." The presiding justice dissented with a written opinion (179 A. D. 942) in which he said (p. 943):

"It is vital to the public welfare that the cities of the State be supplied with pure and wholesome milk. It is of the utmost importance to the public welfare that the farmers should be induced to produce milk for use in the cities and that the persons purchasing and shipping milk for city use shall be responsible persons so that the seller shall receive pay for his milk. It is a fact too well known to need discussion that the farming community has suffered great damage by irresponsible persons buying on credit their milk for shipment to the large cities without paying therefor.

Such transactions naturally tend to convince the farmer that it is better for him to limit his production of milk or take it to the home factory to be manufactured there, dealing with people whom he knows rather than to sell it for city use. It is apparently recognized as impracticable that the payments should be made to the farmer upon the delivery of each sale of milk. When a person seeks to buy milk from the farmers of the State to ship to the cities of the State for use and consumption, his transactions affect the public interest, and the welfare of the farming community means the welfare of the public, and the State may properly protect the farmer from irresponsible dealers who seek his milk for shipment to the cities. This law, as we have indicated, has more than one aspect. It naturally benefits the farmers, but it guarantees the city a supply of milk. The farmer is not naturally a financier, and when he produces the milk he should be reasonably assured that he is to have its value, and the State may prevent irresponsible people from taking away his milk without giving some reasonable surety that it will be paid for. In the absence of some such provision, the shipment of milk to the cities would fall off and be greatly limited. It is unnecessary to cite the many cases sustaining statutes providing for licensing or regulations of the various trades, businesses and professions in the interests of the public welfare. We conclude this statute is a proper exercise of the police power of the State and is valid. 'It may be said in a general way that the police power extends to all the great public needs. (*Camfield v. United States*, 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the pos-

sibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the Legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it.' (*Noble State Bank v. Haskell*, 219 U. S. 104, 111; *Assaria State Bank v. Dolley*, *Id.* 121.)"

On appeal to the Court of Appeals (222 N. Y. 416) it was held (p. 425) that "the complaint does not state facts constituting two hundred and ninety-eight causes of action, neither does it state facts constituting one cause of action." The judgment of the Appellate Division was therefore affirmed on that ground alone. At the same time, however, the law was held constitutional as applied to a domestic corporation (pp. 431-433).

In the Beakes case, it should be noted, the question was not presented whether the statute was valid as an exercise of the police power of the state over individuals (222 N. Y. 416 at 429). That issue came up for decision in *People of the State of New York v. Perretta*, 253 N. Y. 305. The State sued for a one hundred dollar penalty because the defendant had operated a milk gathering station without the license required by the then Agriculture and Markets Law section 252* (Ch. 416, N. Y. Laws of 1927). Upon motion of the defendant, the complaints (there were two actions) were dismissed by the Supreme Court, it be-

*The applicant shall satisfy the commissioner of his or its character, financial responsibility and good faith in seeking to operate a milk gathering station, manufactory or plant. The commissioner if so satisfied shall issue to such applicant, on payment of ten dollars, a license entitling the applicant to operate milk gathering stations, manufactories or plants within the state until the first day of September next following. The license may designate the place or places where such milk gathering stations, manufactories or plants are to be operated. A license shall not be issued unless the applicant shall execute and file with the application a bond, or shall be relieved from filing of bond as provided in the next section.

ing held that the act in question was unconstitutional under Federal and State Constitutions (134 Misc. 652).

The Appellate Division of the Fourth Judicial Department affirmed the dismissal. Here again, there was a dissent by the presiding justice, who, after a discussion of the Court of Appeals opinion in the *Beakes* case, said: (228 A. D. 420 at 425)

“Aside from the authority of the *Beakes Dairy Co.* case, I reach the same result. Milk producers, very generally, live in localities where the principal, if not the only reasonable outlet of their product is that of the receiving plant of the middlemen. Their choice of customers is, therefore, restricted. The opportunity to learn of the financial responsibility and standing of the purchaser of the dairy product is slight. The failure of such middlemen to meet their obligations to milk producers is indicated by the legislation to be an evil prejudicial to the interests of the State. The production of milk is of vital concern to the people. Uncertainty of payment under the circumstances might be expected to curtail its production. The Legislature finding here an evil has taken steps to check it. I may, of course, doubt whether such an evil exists. I cannot say with any fair degree of certainty that such an evil does not exist, or that reasonable men may not think so. All such matters are primarily for the consideration of the Legislature. We should not pronounce such a statute unconstitutional unless we can say with a fair degree of certainty that reasonable men may not here find an actual evil.”

The Court of Appeals, in its turn, reversed the lower Courts. Said Mr. Justice Pound, writing the opinion of the court: (253 N. Y. 305 at 308, 309)

“In brief, the law limits the right of persons or corporations to conduct milk-gathering stations as

defined by the act to those of approved character, financial responsibility and good faith, licensed by the Commissioner for the purpose, after giving an approved bond to secure the prompt payment of all amounts due to producers or, in lieu thereof, satisfying the Commissioner of their ability to pay probable creditors.

"This act is, in substance, the re-enactment of a former law which was before the court for consideration in *People v. Beakes Dairy Co.* (222 N. Y. 416; annotated, 3 A. L. R. 1271) and was there upheld as a proper regulation of the reserved power to amend the charters of domestic corporations, expressly reserving the question of the power of the Legislature thus to regulate the business of individuals. A corporation is a person and as such is entitled to the equal protection of the laws (*Liggett Co. v. Baldridge*, 278 U. S. 105) and if the legislation is a competent exercise of legislative power over corporations, it would seem that it is also a proper exercise of such power over individuals. (*Matter of Mount Sinai Hospital*, 250 N. Y. 103.)

"The police power is 'the least limitable of the powers of government.' (*District of Columbia v. Brooke*, 214 U. S. 138, 149.) It extends to all the great public needs. (*Camfield v. United States*, 167 U. S. 518.) The validity of police regulations must depend on the circumstances of each case and the character of the regulation, whether arbitrary or reasonable. A legitimate public purpose may always be served without regard to the constitutional limitations of due process and equal protection. (*People ex rel. Durham Realty Co. v. La Fetra*, 230 N. Y. 429; *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63.)

"The Legislature has a wide discretion in protecting the public from the dishonest or irresponsible. (*Roman v. Lobe*, 243 N. Y. 51; *People v. Teuscher*, 248 N. Y. 454.) The question is how to apply the test. Is it a public evil to permit irresponsible persons and corporations to operate

milk-gathering stations although they may engage in many other legal callings at will? If so, milk gatherers may be put into a particular class. (*New York ex rel. Bryant v. Zimmerman, supra.*)”

The dissenting opinion in the Beakes case, *supra*, is then quoted, after which, the opinion continues (pps. 310, 311, 312 and 313) :

“The producer of milk for the city market desires to find a ready purchaser near at hand to take his product from the source of supply to the point of consumption. He cannot peddle his product from door to door or hold it to await a rise in market prices or a cash purchaser. He must sell it to milk gatherers; deliver it fresh and often on credit. Such are the conditions of the market peculiar to the handling of milk. The law deals with a definite class, *i. e.*, the milk gatherers. It is not wholly for the benefit of the farmer. If it gives him ‘a club to aid in the collection of debts which is not given to other creditors’ (*State of Maine v. Latham*, 115 Me. 176), it gives it to him to keep open the stream of milk flowing from farm to city as well as to guard him from financial loss.

“When the Legislature takes notice of the dependency of the city on the farm and of the hard and often unremunerative character of farm life, we think it may protect the farmer from fraud arising from the peculiar conditions under which milk is produced and sold.

“That the evil is not imaginary or local is evidenced by the like legislation of other States as follows: Connecticut: L. 1919, ch. 194; Maine: L. 1915, ch. 32; Minnesota: L. 1927, ch. 427; New Hampshire: Public Laws, ch. 164 as amd. by L. 1929, ch. 35; New Jersey: L. 1917, ch. 74; Rhode Island: General Laws (1923), ch. 204; Vermont: General Laws (1917), ch. 239, §5727, as amd. by L. 1923, No. 103; L. 1929, Nos. 105, 106; Wisconsin: L. 1925, ch. 389, §1 (Statutes Wis. (1925), §99.32).

"The Connecticut statute was declared unconstitutional as class legislation in *State v. Porter* (94 Conn. 639). The Wisconsin act and the Maine act vary in detail from the New York statute but they have also been held unconstitutional for like reasons in *State ex rel. Hickey v. Levitan* (190 Wis. 646) and *State of Maine v. Latham* (*supra*). The reasoning in these cases rests on the abstract doctrine of liberty of contract rather than the practical necessities of the case. The Supreme Court of the United States in *Payne v. Kansas* (248 U. S. 112, followed in *Arnold v. Hanna*, 276 U. S. 591, affg. 315 Mo. 823) had before it a State law forbidding the sale of farm produce on commission without an annual license obtained on a proper showing of character, responsibility, etc., and a bond conditioned to make honest accounting. The court said with directness and brevity: 'Plaintiffs in error maintain that the statute is class legislation which abridges their rights and privileges, that it deprives them of the equal protection of the laws and also of their property without due process of law—all in violation of the Fourteenth Amendment.'

"'Manifestly, the purpose of the State was to prevent certain evils incident to the business of commission merchants in farm products by regulating it. Many former opinions have pointed out the limitations upon powers of the States concerning matters of this kind, and we think the present record fails to show that these limitations have been transcended. *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342; *Brazee v. Michigan*, 241 U. S. 340; *Adams v. Tanner*, 244 U. S. 590.'

"A legalistic distinction exists between the merchant who handles farm produce on commission and the milk gatherer who buys milk on credit from the farmer. One acts as agent for a principal. The other is a mere debtor. The legal difference in the evil results of the dishonesty or irresponsibility of the agent and of the debtor may be readily discernible to a lawyer. He would say

that a fiduciary may expect to secure his *cestui que trust*. With the farmer, the obvious result of dishonesty or irresponsibility in both cases would be the loss of the return on his farm products by a bad system of marketing. When the product in question is milk, the choice of evils between the commission merchant and the milk gatherer is reduced to the vanishing point. As the law is thus read, the requirement of a bond to secure the payment to producers is a concession rather than a burden. It applies only to those of doubtful integrity and financial responsibility. Others may obtain exemption. Doubtless a license may be required. Many trades and callings are open only to those who are licensed to pursue them. If the calling is so innocent that it must be left open to all alike the State may not require a license. If, on the other hand, the dishonest and unworthy should not be permitted to take advantage of the opportunities presented by a given trade or calling, they may be 'told to stand aside.' (*Roman v. Lobe*, *supra*, p. 54; *Bendell v. De Dominicis*, 251 N. Y. 305, 310.)

"When the Legislature has power to act, it may act without interference from the courts. The Legislature has, we find, acted on reasonable grounds and in a reasonable manner."

The lower Courts have followed these decisions. In *Ten Eyck v. Eastern Farm Products, Inc.*, 160 Misc. 402, the Commissioner of Agriculture and Markets made an application for an order enjoining the defendant *pendente lite* from buying milk from producers for resale without a surety bond. There were other questions (p. 405) raised as to the effect of *Baldwin v. G. A. F. Seelig*, 294 U. S. 511, on certain then existing price fixing provisions in the Agriculture and Markets Law*

*These provisions were temporary and have since expired. Retail milk prices are no longer established by law in New York. Payments to producers may be fixed by Order or Agreement under chapter 383 N. Y. Laws of 1937 or in co-operation with the Federal Government.

but they do not have any bearing on the point for which the case is cited.

"It is asserted by the defendant," said the court (p. 403), "that grave doubts exist as to the constitutionality of the so-called Milk Control Law in view of the decision in *Baldwin v. G. A. F. Seelig*, (294 U. S. 511). Such doubts are not apparent unless one takes the view that the courts of ultimate appeal will completely reverse themselves. (*Nebbia v. New York*, 291 U. S. 502; *Hegemen Farms Corp. v. Baldwin*, 293 *id.* 305.) But irrespective of one's view as to the price fixing part of the statute the principle that the State may require a bond from a milk dealer as a prerequisite to doing business is firmly established. (*People v. Perretta*, 253 N. Y. 305.) As pointed out this requirement antedates emergency legislation, in principle at least if not in detail.

"With the wisdom or expediency of such legislation courts are not concerned. The question of constitutionality is a question of power. This is not to say that the plaintiff has the right to act capriciously and arbitrarily in exacting a bond which amounts to confiscation. From the information disclosed on these papers it cannot be justly said that the plaintiff has abused his discretionary power. The bond required appears to be fairly commensurate, within reasonable limits, to amount of business concededly done. The answer of the defendant that it cannot furnish such a bond is not sufficient. Such an answer might be made in any case."

Temporary injunction was granted and defendant appealed to the Appellate Division for the Third Judicial District, where it was held on authority of *People v. Perretta, supra*, that "The right of the plaintiff* to require a bond is unquestionable" (249 A. D. 891). Re-argument and leave to appeal to the Court of Appeals were both denied. (250 A. D. 798.)

*The Commissioner of Agriculture and Markets of the State of New York.

Statutes in Other Jurisdictions.

In addition to New York and Pennsylvania, several other states of the Union have laws relating to the bonding of milk dealers purchasing milk from producers. The regulation of the business of creamery companies in their dealings with milk producers has been a subject of legislation in VERMONT for many years. *Chapter 196 of the Public Laws as amended by 101 of the Acts of 1935 as amended by No. 97 and No. 98 of the Acts of 1937.* The history of this subject in the State of Vermont is informatively set forth in the case of *Clifford v. West Hartford Creamery Co., Inc.*, 103 Vt. 229 at 253 from which we quote:

"Chapter 239 of the General Laws provides for the licensing of a creamery company and the furnishing of security by it to secure the payment of its patrons' accounts, before it does business in this State. It is not necessary to consider in detail all of the legislation upon this subject. A brief history of the development of the same and reference to some of its important features is sufficient.

"Act No. 138 of the Laws of 1906, which became Chapter 211 of the Public Statutes in the revision of 1906, provided for the licensing of foreign creamery companies before they did business in this State, and further provided that if the commissioners were satisfied that a company was not safe and entitled to public confidence, they should, before granting a license, require it to furnish a bond conditioned for the payment of all sums recovered against it. There were no provisions as to the legal proceedings to be brought, or by whom, if there was a breach of its bond by a company by its failure to pay the sums due its patrons.

"Act No. 181 of the Laws of 1912 amended some of the sections of said Chapter 211, and also contained additional legislation on the subject-matter,

which was made a part of said chapter. The amendments, so far as material, provided that before a license was issued to a company, the commissioners should require it to file a surety bond for the benefit of its patrons.

"The additional legislation provided that, in the absence of an agreement in respect thereto, payments by a company should become due and payable on the fifteenth of each month for all milk and cream furnished or delivered to it by its patrons during the preceding calendar month. It also provided that if a company for ten days after they became due failed to pay its patrons the several amounts due them for milk and cream, it should be in default as to all patrons whose milk and cream accounts were unpaid in full, and its bond should be forfeited to the extent of all sums then due to its patrons in this State. It further provided that the bond required by the chapter should be given to the commissioners as trustees of the company furnishing the same, for each and all of its patrons in this State, and that upon breach of condition by failure of the company to pay its patrons' accounts, the commissioners, upon application by a patron having an unpaid account, should institute appropriate proceedings on the bond in their names as trustees for the benefit of all patrons of such company to whom it might be indebted at the time such proceedings should be instituted.

"Said Chapter 211 was amended again by Act No. 168 of the Laws of 1915, which also contained additional legislation that was made a part of the chapter. This act abolished the distinction between foreign and domestic creamery companies as to being licensed and bonded, and provided that all companies, as defined by section 1, should be licensed before doing business in this State.

"The amendments, so far as material, provided that before issuing a license, the commissioners might require a company to furnish a bond, or they might accept, in lieu of such bond, such security by

way of mortgage or otherwise as they deemed sufficient; that the same should be taken for the sole benefit of patrons in this State of such company; and, if a company paid its patrons weekly or bimonthly, such fact should be taken into consideration by the commissioners in determining the amount of bond or other security that such company should be required to furnish.

"The additional legislation is now contained in G. L. 5732, the contents of which are hereinbefore given, and in G. L. 5736, which provides that a company shall not be required to file a bond or give security if all of its patrons consent in writing that the same need not be given.

"Said Chapter 211, as amended by said Acts of 1912 and 1915, became Chapter 239 of the General Laws in the revision of 1917.

"It is apparent that all of these acts we have considered have but one object in view—the protection of producers of milk and cream in their dealings with creamery companies. That there was a necessity for such legislation is evident when it is borne in mind that the creamery companies and the producers do not deal with each other on equal terms; that the advantage has always been with the companies. It is the company that weighs the milk and cream of the producer; that tests it for the butter fat content upon which the price paid for it is based; and that fixes the price paid for the milk and cream received by it. Before the enactment of the provisions of Chapter 239, it was only by litigation by the individual producer that he could collect what was due him, if he collected at all, when a creamery company refused or failed to pay him for his milk and cream. The unfortunate experiences of producers with creamery companies in these respects presented an evil which the Legislature sought to correct by this legislation."

CALIFORNIA provides for milk bonding in section 737.5 of the Agricultural Code (1937 Deering) paragraph b*, its language, by the way, quite similar to that of the New York requirement. The petitioner, in *Ex parte Willing*, C. R. 1638—District Court of Appeal, 3rd Dist., California [June 29, 1938] 80 Pac. 2nd 1027 at 1028 and 1029, "was arrested for failure to comply with section 737.5 of the Agricultural Code of the State of California, St. 1933, p. 60 added by 1935, p. 928 amended by St. 1937, p. 50 in that he engaged as a purchaser and distributor of fluid milk, etc., without first having obtained a license therefor, and giving a bond provided for in the section just referred to."

Question was raised as to the constitutionality of the section involved upon the ground that section 737.12

*Section 737.5 Calif. Agricultural Code (1937 Deering) paragraph b.

(b) Bond. Before any license is issued to any distributor who purchases fluid milk or fluid cream from producers, the applicant shall execute and deliver to the director a surety bond in the minimum sum of \$1,000.00, executed by the applicant as principal and by a surety company qualified and authorized to do business in this State as surety. Said bond shall be upon a form approved by the director, and shall be conditioned upon the payment in the manner required by this chapter, of all amounts due to producers for fluid milk and fluid cream purchased by such licensee or applicant during the license year. Said bond shall be to the State in favor of every producer of fluid milk and fluid cream. In case of failure by a distributor to pay any producer or producers for fluid milk or fluid cream in the manner required by this chapter, the director shall proceed forthwith to ascertain the names and addresses of all producer-creditors of such distributor, together with the amounts due and owing to them and each of them by such distributor, and shall request all such producer-creditors to file a verified statement of their respective claims with the director. Thereupon the director shall bring an action on the bond on behalf of said producer-creditors. Upon any action being commenced upon said bond, the director may require the filing of a new bond, and immediately upon a recovery from any action upon such bond, such distributor shall file a new bond, and upon failure to file the same within ten days in either case, such failure shall constitute grounds for the revocation or suspension of the license of such distributor. In the event the recovery upon the bond is not sufficient to pay all of the claims as finally determined and adjudged by the court, any such amount recovered shall be divided pro-rata among said producer-creditors.

Amount of bond. The minimum bond of \$1,000.00 shall be required of distributors purchasing an average daily quantity of fluid milk not to exceed 100 gallons; distributors purchasing an average daily quantity of 100 gallons and less than 200 gallons must post a bond in the amount of \$2,000.00; distributors purchasing an average daily quantity of 200 gallons and less than 300 gallons must post a bond in the amount of \$3,000.00; distributors purchasing an average daily quantity of 300 gallons or more shall post a bond in the sum of \$5,000.00.

Additional bond. In the event that any distributor so increases his purchases of fluid milk or fluid cream during the license year that said purchases exceed the amount for which said distributor is bonded, said distributor shall forthwith post such additional bond or bonds as may be required to comply with the provisions of this section. [Added by Stats 1935, p. 928; Amended by Stats 1937, p. 50.]

of the same code exempting retail stores as defined, rendered discriminatory the licensing and bonding provisions relative to distributors.

"It is admitted", said the court, "that the police powers of the state authorize the legislature to legislate on the subject of production, processing and distribution of fluid milk and fluid cream, in order that a pure product may be furnished to the consumer, and that the producer may be safeguarded against irresponsible persons who engage in business as collector-distributor. An analysis of the business carried on by collector-distributors, and the manner of conducting business by grocery stores, etc., furnishes a clear exposition of a basis warranting separate classification. The collector-distributor goes to the producer at his dairy barn and obtains so many gallons of milk from the producer, already placed in cans by the producer, conveys the same to a plant where that milk is pasteurized or processed and made fit for human consumption, and the butterfat content contained therein ascertained and determined. The collector-distributor pays nothing to the producer at the time of the collection of the cans containing so many gallons of milk, but after the gallons of milk contained in the cans are pasteurized or processed, and the butterfat contained therein ascertained, a report is made by the collector-distributor to the producer, stating the same, and then, by mathematical calculation, the value of the gallons of milk delivered by the producer to the collector-distributor is made certain, and the amount of the indebtedness of one to the other established. The collector-distributor then takes the milk and distributes it among his customers, so many bottles or cases to one establishment and so many to another, and likewise distributes to consumers, morning after morning, so many bottles of milk fit for human consumption."

The petition was denied and the proceedings dismissed. We have been advised however that hearing has been granted by the Supreme Court.

For complete discussion of the California Bonding Law see *Brock v. Valley Dairy Company*, Aug. 3, 1937, Los Angeles County Superior Court, upholding the act and relying upon *People v. Perry*, 212 Cal. 186; 298 Pac. 19.

INDIANA'S Milk Control Law (Acts 1935, p. 1365) provides by section 7 as amended by Acts 1937, (official) p. 1087, that each milk dealer as defined by the act shall apply to the Milk Control Board for a license to engage in business as a milk dealer as more fully defined by section 2 (f). The application must include certain prescribed information and be accompanied by (Section 7B; p. 1088):

“(a) Either a bond in such form and amount as the board may prescribe, with surety satisfactory to the board, conditioned for the prompt payment of all obligations to producers when due; or a financial statement showing evidence satisfactory to the board to the effect that the applicant is of sufficient financial responsibility to insure prompt payment for sixty days' supply of milk.”

Here again great similarity exists between the Indiana and New York laws for as was observed by the Indiana Supreme Court in *Albert v. Milk Control Board*, 200 N. E. 688, 698, “the Milk Control Act of Indiana is very similar and in many respects identical with the Milk Control Acts of New York and New Jersey. Doubtless the authors of the Indiana act had these acts before them when they wrote the Indiana act, and followed them to a large extent” (p. 698). The bond requirement does not seem to have been at issue in this case. The act as a whole and in so far as there assailed was upheld as within the State's police power.

At this writing, we are advised by the Attorney General of MASSACHUSETTS that there are no decisions

concerning that Commonwealth's milk dealers bonding requirement found as section 42A, Chapter 94, Annotated Laws of Massachusetts, Vol. 3. (Acts 1933 Ch. 338, sec.—2; 1935, Ch. 126) which in its present form so far as here pertinent reads:

“ * * * A license shall not be issued unless the applicant shall execute and file at the time of filing the application, or within such further time as the commissioner may allow, a bond or other security satisfactory to the commissioner or shall be relieved therefrom as provided in section forty-two E.”

The bond, by section 42-B* is conditioned upon the prompt payment of all amounts due to producers for milk or cream sold by them to the licensee during the period for which application for license is made.

MINNESOTA, according to our best information, requires the bonding of creameries. Pursuant to 1 Mason Minn. St. 1927 (1938 Supplement), Section 6240—18½ b, wholesale dealers in produce must be licensed. Section 6240—18½-a defines the term “produce” to mean

*42 B. Bond—The bond required by the preceding section shall be payable to the commissioner and shall be in a sum fixed by him. Said sum shall be substantially equivalent to the total purchase price, as determined by the commissioner, of milk and cream purchased by the applicant from Massachusetts producers in the average period between payments by him to producers during the three months immediately preceding the date of application for a license, plus ten per cent of such total purchase price, or, if the applicant is not then operating any milk plant or manufactory, shall be substantially equivalent to the total purchase price, as estimated by the commissioner, of milk and cream to be so purchased in the estimated average period between payments by the applicant to producers during the period for which the license is to issue, plus ten per cent thereof. Such bond shall be in a form prescribed by the commissioner and shall be executed by the applicant for a license and by a surety company authorized to do business in this commonwealth. It shall be upon the condition that the applicant, if granted a license, shall faithfully comply with the provisions of this chapter applicable to milk plants and manufactories, shall not give any cause for the revocation of his license under section forty-two H and shall promptly pay all amounts due to producers of milk or cream sold by them to him during the license period for which the application is made. In lieu of such bond, the commissioner may accept a note of like amount payable to him, secured by a mortgage of real estate on personal property, or both, or by a deposit of cash or collateral with him. Any such mortgage, or note secured by cash or collateral, shall be upon the same condition as is herein provided for a bond. Any cash or collateral deposited under this section or under section forty-two D shall be deposited by the commissioner with the state treasurer, who shall hold the same subject to section forty-two C. (1933, 338, §2, appvd. July 18, 1933.)

and include "the raw and finished products of the dairy, creamery, cheese factory." As a prerequisite of licensing, a bond conditioned for the payment when due of the purchased price of produce bought shall be filed with the Commissioner of Agriculture, Dairy and Food.*

In NEW HAMPSHIRE, every person who purchases milk or cream within the state to be resold as milk or cream or to be manufactured into other dairy products shall first obtain a license (Public Laws, Ch. 164, sec-

*6240-18 1/4c, sub. (b) [sub. a, c and d deleted]

6340-18 1/4c. (b) The applicant shall execute and file with the Commissioner a bond to the State of Minnesota with securities to be approved by the Commissioner, the amount and form thereof to be fixed by the Commissioner, conditioned for the faithful performance of his duties as a dealer at wholesale, provided that any and all bonds heretofore executed and filed with the commissioner by dealers at wholesale containing substantially the requirements of this act are hereby confirmed and approved, for the observance of all laws relating to the carrying on of the business of a dealer at wholesale, for the payment when due of the purchase price of produce purchased by him when notice of default is given the commissioner within 30 days after the due date; provided that the bond shall not cover transactions wherein it appears to the commissioner that a voluntary extension of credit has been given on said produce by the seller to the licensee beyond the due date, for the prompt settlement and payment of all claims and charges due the State of Minnesota for services rendered or otherwise, for the prompt reporting of sales, as required by law, to all persons consigning produce to the licensee for sale on commission and the prompt payment to the persons entitled thereto of the proceeds of such sales, less lawful charges, disbursements and commissions. Such bonds shall cover all wholesale produce business transacted in whole or in part within the State of Minnesota, and the license, or a certified copy thereof, shall be kept posted in the office of the licensee at each place within the state where he transacts business. All licenses shall expire May 31 of each year. The fees for each license shall be \$12.50, and for each certified copy thereof one dollar. Whenever the licensee shall sell, dispose of or discontinue his business during the lifetime of his license, he shall at the time such action is taken notify the Commissioner in writing, and shall upon demand produce before the Commissioner a full statement of all assets and liabilities as of the date of transfer or discontinuance of said business.

tion 1 as amended 1931 Ch. 4) and under certain circumstances give bond.*

NEW JERSEY by law provides that a milk dealer's license shall not be issued unless and until the applicant shall file "a good and sufficient surety bond" conditioned "for the payment of all amounts due to persons who have sold milk or cream to the licensee, during the period that the license is in force."**

*Section 5—Bond. Any applicant, not having such real estate, shall be permitted to furnish security by a bond signed by such applicant and some surety company authorized to do business within this state, in such sum as the commissioner of agriculture shall fix, and conditioned upon the payment by the principal of all his accounts for milk or cream so purchased within this state, within fifteen days after the same shall become due, and for the faithful performance of and compliance with all the conditions and requirements imposed upon such dealers by the commissioner of agriculture or by the laws of the state. Such bond shall run to the state as trustee for the benefit of all residents of the state who may sell to the principal any of the aforesaid products. 1913, 220:3, 1919, 108:2.

Section: 5-a Waiver of Bond. The commissioner of agriculture may waive the furnishing of the bond described in the preceding section if he is satisfied that the applicant is safe, reliable and entitled to confidence, provided that all of the producers in New Hampshire selling to such person declare in writing that such bond need not be given and such written agreement is duly executed and filed with the commissioner. (Amendment, 1929, Chapter 35. According to Public Laws 1926, Chapter 164, Section 1 as amended 1934, Chapter 4, persons making purchases from less than five producers exempted.)

**Revised Statutes of New Jersey (Official) Title 4 Chapter 12.

Section 4:12-2 Licensing of dealers who buy for shipment, sale, resale or manufacture. No person, unless exempted by the secretary as provided in this section, shall engage in or carry on the business of buying milk or cream in this state for shipment, sale, resale or manufacture, unless the business is regularly transacted or conducted at an office or station within the state and unless such person is duly licensed as provided in this article.

The secretary may, in his discretion, exempt from the provisions of this article any dealers who do not make purchases of milk or cream from more than two producers, or whose total monthly purchases do not exceed two hundred dollars.

Source. L. 1917, c. 74, §1, p. 133, as am. by L. 1918, c. 160, §1, p. 463 [1924 Suppl. §81-153 E (1)], L. 1935, c. 311 §1 p. 936.

4:12-4 Bond or deposit for protection of creditors. A license shall not be issued unless and until the applicant shall file with the secretary a good and sufficient surety bond, executed by a surety company duly authorized to transact business in this state, in a sum not less than one and one-half times the estimated maximum monthly indebtedness of the applicant to the persons from whom he may purchase or receive, or may have purchased or received, milk or cream.

The bond shall be approved as to form and sufficiency by the secretary, shall be given to the secretary in his official capacity and shall be conditioned for the faithful compliance by the licensee with the provisions of this article and for the payment of all amounts due to persons who have sold milk or cream to the licensee, during the period that the license is in force.

The applicant may, in lieu of such bond, deposit with the secretary money, or United States government securities in an amount equal to the sum secured by the bond required to be filed.

The money or securities so deposited shall constitute a separate fund and shall be held in trust for, and applied exclusively to, the payment of claims against the licensee making the deposit, arising from the sale of milk or cream to him.

Source. L. 1917, c. 74, §1, p. 133, as am. by L. 1918, c. 160, §1, p. 463

The WISCONSIN Department of Agriculture and Markets may, by authority of Wisconsin Statutes, 1937, section 100.03, (4) (d) require an applicant or licensee to file a surety bond "conditioned for the prompt delivery of the price to producers."* This section is one of several constituting an emergency program. See *State ex rel. Finnegan v. Lincoln Dairy Company*, 221 Wis. 1, wherein section 100.03 is held valid since statute "deals with an industry subject to regulation under the law" and cannot be denounced as class legislation, citing *People v. Beakes Dairy Co.*, 222 N. Y. 416. (p. 13.)

In Canada, the Province of ONTARIO has a milk dealers bonding law, part and parcel of its Milk Control Act (Section 15, Ch. 76, Revised Statutes, 1937). We are advised by the Hon. P. M. Dewan, Minister of Agriculture, that the requirement has not been challenged although the act, itself, has successfully withstood attack. The attitude of the Provincial Government toward the program is aptly summed up in the 1937 Annual Report of the Department of Agriculture for the year ending March 31, 1937, wherein the following appears at page 110.

"BONDING OF REGULAR DISTRIBUTORS

"Closely associated with the question of licensing is the one of bonding milk distributors to guarantee their accounts with milk producers.

"Every distributor who buys more than one hundred dollars' worth of milk in a payment period and does not pay for the same at the end of

*Section 100.03 (4) (c)—The department shall issue license to each person making proper application and who is fit and equipped for the business. License may be denied, suspended or revoked by special order after notice and hearing as provided in section 93.18, when the applicant or licensee is unfit or unequipped for the business.

Section 100.03 (4) (d)—Under paragraph (c) the department shall consider, in addition to other matters, the character and conduct, including past compliance or noncompliance with law, of the applicant or any person to be connected with the business, and the financial responsibility of the applicant. The department may at any time require an applicant or licensee to file with it a surety bond conditioned for the prompt delivery of the price to producers.

each week is required to file a bond to cover the milk he has purchased.

"These bonds are mostly in the form of Government bonds or the bonds of Surety Companies and at the end of 1936 the following bonds were on deposit:

Bonds of Surety Companies.	\$ 776,390.73
Negotiable Securities	348,120.00

Total Bonds on file.....\$1,124,510.73

"The bonding requirement is considered by producers to be one of the most valuable features of the Act.

"Actually, it was not found necessary to call bonds for payment of accounts during 1936, but the restraining effect of the bond being on file saved producers large sums of money and encouraged prompt payments.

"In this connection it is worthy of note that since bonding requirements became effective, over thirty million dollars' worth of milk has been purchased by distributors and losses from unpaid accounts have been almost negligible, whereas in former times every few months a distributor would go into bankruptcy with losses of thousands of dollars to producers, or would just be unable to pay his producers and they, as ordinary creditors, had no effective protection.

"A further value of the bonding requirement was seen during the past three years but is no longer effective. When the Act was first passed, there were about two hundred distributors in the Province who could not secure a bond and who owed producers large arrearages. Rather than be unable to secure licenses, these operators commenced paying for current milk receipts on a weekly basis and agreed to reduce their arrearages a definite percentage each month and the Board is pleased to report that now all but a very few of these have their business on a sound basis or have turned them over to stronger hands, with comparatively little loss to producers.

"The bonding requirements of the Act, even though not preventing all losses, have given milk producers adequate protection."

In the Province of QUEBEC, Canada, "Every milk dealer, whose purchases exceed one hundred dollars per month, must give a guarantee for the payment of the sums which he owes or may owe to his producer-supplier." Dairy Products' Act, 23 Geo. V, c. 24, sec. 8.

These paragraphs, we submit, contain a just appraisal of the reason for and value of the statute at bar, while their foreign authorship should free them from the enthusiasm of a popular local program.

This recitation of similar statutes in many states has a worthy significance. As was said by Mr. Justice Cardozo in *Roman v. Lobe*, 243 N. Y. 51 at 55, after having remarked that the Legislatures of many States had adopted statutes similar to the one there at bar: "Legislation so general marks a rising tide of opinion which is suggestive and informing." Likewise, the reasonableness of the bond requirement "is made more probable" by the fact that it has been adopted in other states. *Bain Peanut Co. v. Pinson*, 282 U. S. 499 at 502.

There may be other jurisdictions having the same kind of bonding requirement. On the other hand, some states have found that their statutes enacted for the similar purpose of protecting milk producers have been obnoxious to their individual constitutions. Where there was no evident answer in the statute for the distinction as to operators of milk gathering stations the bond requirement was held an invalid exercise of the police power since no reasonable connection was apparent between the statute and the common good. *State v. Old Tavern Farm Inc.* [1935] 133 Maine 468; 180 Atlantic 473. And where there was found an unnecessary restriction on the right of contract, a

violation of the principle of equality and no provision for appeal to any court from the Dairy Commissioner's determination, a Connecticut bond provision was held invalid. *State v. Porter* [1920] 94 Conn. 639; 110 Atl. 59. For discussion of these cases see *Brock v. Valley Dairy Company, Inc.* Superior Court, Los Angeles County, California, August 3, 1937, upholding California statute, *supra*, guaranteeing payments to producers. In New York, however, experience and investigation disclosed valid reasons for the legislation. In Pennsylvania the purpose is declared in section 101 of the Act of April 28, 1937 (P. L. 417).

"Section 101. Legislative Purpose.—In the exercise of the police power of the Commonwealth, it is hereby declared that the production, transportation, manufacture, processing, storage, distribution, and sale of milk in the Commonwealth is a business affecting the public health and affected with a public interest, and it is hereby declared that this act shall be and is hereby enacted for the purpose of regulating and controlling the milk industry in this Commonwealth, for the protection of the public health and welfare and for the prevention of fraud."

POINT I

The filing of a bond conditioned for the payment of all amounts due producers for milk purchased is not a regulation of nor such a burden upon interstate commerce as to render the requirement unconstitutional.

The conclusion of law of the court below holding the bond requirement "a regulation of and a burden upon interstate commerce", (R. p. 24) is not enough to defeat state action nor to render invalid a commonwealth's proven legislative program for the protection of its citizens against fraud and attendant unrequited

pecuniary damage. Our thought in this regard is strikingly illustrated by the case of *South Carolina State Highway Department v. Barmwell Brothers Inc. et al.*, 303 U. S. 177; Official Preliminary Print Vol. 303—No. 1; Law Ed. Advance Opinions, Feb. 28, 1938. The act reviewed prohibited the use on state highways of motor trucks and "semi-trailer" motor trucks of a width exceeding 90 inches and weight including load in excess of 20,000 pounds. "The principal question for decision," said the court, "is whether these prohibitions impose an unconstitutional burden upon interstate commerce." The three-judge statutory court was of the opinion that although the Federal Motor Carriers' Act did not supersede the Carolina statute, the weight and width restrictions did place an unlawful burden upon interstate motor traffic. The Supreme Court reversed this holding. Following the citation of numerous cases, Mr. Justice Stone, speaking for the court said (Official Print p. 189; Law. Ed. p. 476):

"In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.

"Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power

and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. *Sproles v. Binford*, *supra*; *Stephenson v. Binford*, 287 U. S. 251, 272."

A second illustration of the same principle is found in *E. Pat Kelly v. State of Washington ex rel. Foss Co.*, (November 8, 1937) 302 U. S. 1. The respondents, owners of motor-driven tugs, sought to prevent enforcement of a State of Washington law relating to the inspection and regulation of vessels. The State Supreme Court held the statute invalid "if applied to the navigable waters over which the Federal Government has control." After hearing, reargument was ordered (301 U. S. 671) and the Attorney General of the United States was requested "to present the views of the Government" upon the question whether the state act "or the action of the officers of the State thereunder, conflicts with the authority of the United States or with the action of its officers under the Acts of Congress."

"The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government", (p. 9), but Mr. Chief Justice Hughes, writing for the court, found that (pp. 9, 10):

"Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction al-

though interstate commerce may be affected. *Minnesota Rate Cases*, 230 U. S. 352, 402. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' *Sinnot v. Davenport*, 22 How. 227, 243; *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 623, 624; *Reid v. Colorado*, 187 U. S. 137, 148; *Crossman v. Lurman*, 192 U. S. 189, 199, 200; *Asbell v. Kansas*, 209 U. S. 251, 257, 258; *Missouri Pacific Ry. Co. v. Larabee Mills*, 211 U. S. 612, 623; *Savage v. Jones*, 225 U. S. 501, 533; *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 293, 294; *Carey v. South Dakota*, 250 U. S. 118, 122; *Atchison, T. & S. F. Ry. Co. v. Railroad Commission*, 283 U. S. 380, 392, 393; *Mintz v. Baldwin*, 289 U. S. 346, 350; *Gilvary v. Cuyahoga Valley Ry. Co.*, *supra*.^a

a—*Under Its Police Power, A State May Protect Its Citizens Against Fraud.*

The statutory purpose declared by the bonding legislation of the various states as heretofore disclosed seeks to protect producers from fraud or the possibility of it. It was not imaginary. It was known through bitter experience. It was found by legislative investi-

gation. It was confirmed by the courts. Where "the general nature of the business is such, that unless regulated, many persons may be exposed to misfortunes against which the legislature can properly protect them",* the requirement is not in itself a regulation of interstate commerce, although it may in some degree effect those engaged in such traffic. *Sherlock v. Alling*, 93 U. S. 99, *Pennsylvania Railroad Company v. Hughes*, 191 U. S. 477.

In the present case, the respondent is a Pennsylvania corporation. It operates a milk plant in the State of Pennsylvania. It buys milk from Pennsylvania producers. The milk is brought to the plant by the producers themselves. It is there weighed by respondent. It is cooled. The milk of all the 175 producers is commingled so that the identity of the milk of any one producer is forever lost. Held at the plant for a period of less than twenty-four hours, the commingled milk is later shipped in fluid form by tank truck to a New York City destination (R. pps. 16, 17). The producer has delivered his product but in accordance with trade custom and practice he has not been paid for it. The protection of such persons against fraud is especially needed. Although declared with respect to an "inspection" statute, a quotation from *Reid v. Colorado*, 187 U. S. 137, 150, 151, pointedly reviews the doctrine here espoused.

"Certain principles are well settled by the former decisions of this court. One is that the purpose of a statute, in whatever language it may be framed, must be determined by its natural and reasonable effect. *Henderson v. New York*, 92 U. S. 259, 268, sub nom. *Henderson v. Wickham*, 23 L. ed. 543, 548. Another is, that a state may not,

**Brazee v. Michigan*, 241 U. S. 340, 343.

by its police regulations, whatever their object, unnecessarily burden foreign or interstate commerce. *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 472, 24 L. ed. 527, 531. Again, the acknowledged police powers of a state cannot legitimately be exerted so as to defeat or impair a right secured by the national Constitution, any more than to defeat or impair a statute passed by Congress in pursuance of the powers granted to it. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Missouri, K. & T. R. Co. v. Haber*, 160 U. S. 613, 625, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488, and authorities cited.

"Now, it is said that the defendant has a right under the Constitution of the United States to ship live stock from one state to another state. This will be conceded on all hands. But the defendant is not given by that instrument the *right* to introduce into a state, against its will, live stock affected by a contagious, infectious, or communicable disease, and whose presence in the state will or may be injurious to its domestic animals. The state—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States."

The state has power to prevent frauds and impositions, *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 552.

b—*The Bond Requirement Does Not "Regulate" Interstate Commerce and Any Burden Upon It Is Incidental, Not Undue Nor Unreasonable.*

We do not believe it may be successfully argued that the filing of a commission merchant's bond protecting persons consigning farm produce for sale on commis-

mission differs in purpose and intent from the milk bond requirement. In *Hartford Indemnity Co. v. Illinois*, 298 U. S. 155, 157, an Illinois statute forbidding the sale or offering for sale of farm produce on commission unless licensed *and bonded* came up for judicial review.

"The Cross Company took licenses, and the appellant became surety on its bonds, for the years ending July 1, 1932, and July 1, 1933. In October, 1932, the Cross Company became bankrupt and failed to account for numerous consignments of fresh fruits and vegetables. Some were shipped from Illinois but most were from other states. The Director of Agriculture brought actions in a state court on both bonds. The court consolidated the cases and they were tried together on stipulated facts.

"The appellant, in addition to defenses raising no federal question, pleaded that the statute was beyond the state's power because a restriction upon, and a regulation of, interstate commerce. Judgment was entered against the Cross Company and the appellant. Both appealed to the Supreme Court of the State, which affirmed the judgment. The appellant summoned and severed the Cross Company and prosecuted an appeal to this court.

"The sole question presented is the constitutional validity of the act as it affects the appellant's liability under its bonds. The statute is a police regulation. The business regulated is local, having its situs within the state and being conducted therein. The fact that the commission merchant contracts to sell, and sells, farm produce forwarded to him from points without, as well as points within, the state is not enough to condemn the regulation of a business carried on within her borders. Such effect as the regulation has upon interstate commerce is indirect and incidental and does not trespass upon the power conferred on Congress by Article I, § 8, of the federal Constitution. In these circumstances, until

Congress, under the commerce power, adopts inconsistent legislation, that of the state remains effective." (See footnote citations.)

It was said in *Townsend v. Yeomans*, 301 U. S. 441 that "the legislature, acting within its sphere, is presumed to know the needs of the people of the State." There, suit was brought by tobacco warehousemen to restrain the enforcement of a Georgia statute fixing maximum charges for handling and selling leaf tobacco. The main contention of the appellants was "that the State had no power to enact the regulation as it attempted to govern transactions in the course of interstate and foreign commerce." It was further urged "that practically all the tobacco grown in Georgia is shipped out of the State." "The purchasers at the 'markets' in Georgia for the most part are manufacturers of cigarettes who *immediately** have the tobacco transported to their plants outside the State; that the purchases made by speculators and warehousemen are for the purpose of resale as soon as possible to the cigarette manufacturers, and thus that the tobacco so bought, as well as the rest, 'is destined for interstate or foreign shipment.' " There was found "no ground for concluding that the state requirements lay any *actual* burden upon interstate or foreign commerce." (pps. 441, 452, 455.)

The true test should be the nature of the activity regulated by Pennsylvania and not whether respondent buys milk and resells it there (although for shipment in interstate commerce) or whether the milk bought is later shipped outside the State by the original purchaser.**

*Italics ours.

**Federal Compress Co. v. McLean, 291 U. S. 17.
Chassaniol v. Greenwood, 291 U. S. 584.

Finally.

It is respectfully submitted that the bonding provision is constitutional and that the judgment below should be reversed.

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PETITION
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 426

**MILK CONTROL BOARD OF THE COMMONWEALTH
OF PENNSYLVANIA,**

Petitioner,

vs.

**EISENBERG FARM PRODUCTS, A PENNSYLVANIA COR-
PORATION.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COM-
MONWEALTH OF PENNSYLVANIA.**

PETITION FOR REHEARING.

**THOMAS D. CALDWELL,
ROBERT T. FOX,
CARL B. STONER,
MAURICE YOFFEE,**

Counsel for Respondent.



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**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COM-
MONWEALTH OF PENNSYLVANIA.**

PETITION FOR REARGUMENT.

To the Honorables the Justices of Said Court:

The petition of Eisenberg Farm Products, by Thomas D. Caldwell, of counsel, respectfully prays your Honorable Court to grant a reargument for the following reasons:

1. Counsel for the petitioner feels that he has failed to make his position clear at the argument before this Honorable Court.

2. In the opinion of your petitioner, the opinion represents a change in the basic law regarding interstate commerce as it has existed, apparently, since the adoption of the commerce clause.

3. Your petitioner feels that the far reaching consequences of this decision have not been sufficiently emphasized to the Court. If carried to its logical conclusion it means that Minnesota can fix the price of forest products, Oregon the price of apples, Pennsylvania the price of coal and so on *ad infinitum* throughout the forty-eight States.

(A) The effect of the present situation will be that forty-seven other States can regulate on matters expressly reserved to the Federal Government, thus resulting in a strained conception of the powers of the Federal Government.

4. The opinion does not refer to the language of late Justice Cardozo in the Highland Dairy case, 300 U. S. 608, in which he said:

“High in Virginia may buy from Highland in Washington at any price they choose.”

Counsel cannot see how this case can be distinguished from the case at bar. Apparently the *Highland* case was not sufficiently brought to the attention of the Court.

5. It is submitted that this Act does, in fact, fix a price which the consumer in New York must pay for this Pennsylvania milk. If the Milk Control Board says that the producer must receive five cents a quart for milk, then obviously the New York price cannot be less than five cents plus the dealer's cost of delivering the milk to the consumer, which includes overhead and profit.

(A) Is it not, therefore, beside the point to say that the Pennsylvania Act does not attempt to fix the price in New York State?

6. A State cannot camouflage a statute or situation with a police power argument, if the result will invade a province exclusively set aside for National control.

(A) In *DiSanto v. Pennsylvania*, 273 U. S. 34, this Honorable Court held:

“A state statute which by its necessary operation directly interferes with or burdens foreign commerce, is a prohibited regulation and invalid, regardless of the purpose with which it was passed. * * * Such regulation cannot be sustained as an exercise of the police power of the state to prevent possible fraud.”

(B) The instrumentality or agency through which interstate commerce flows can be regulated by the State as being of a local nature even though interstate commerce is indirectly affected, but a State cannot, under any guise, regulate or burden the prosecution of interstate commerce (see *Baldwin v. Seelig*, 294 U. S. 511).

(C) The result of such regulation will eventually set a barrier to traffic between one State and another.

(D) The situation in the instant case is no more of a local nature than the situation in *Covington & Cincinnati Bridge Company v. Kentucky*, 154 U. S. 204, where the Commonwealth of Kentucky attempted to prescribe a schedule of tolls upon a bridge connecting with the State of Ohio.

(E) The situation in the instant case is likewise no more local in nature than the situation in the case of *Reading Railroad Company v. Pennsylvania*, 15 Wall. 232, wherein the Commonwealth of Pennsylvania attempted to lay a tax on commodities transported in interstate commerce. The court held in the *Reading Railroad* case, *supra*, that the imposition of the tax, whether large or small, was a restraint upon the privilege or right to have the subjects of commerce passed freely from one State to another without being ob-

structed by the intervention of State license. Its payment was a condition upon which the prosecution of that branch of commerce was made to depend and its imposition, therefore, was in conflict with the power of Congress over the subject.

(1) In the instant case, the Commonwealth of Pennsylvania is attempting to do exactly what it attempted to do in the *Reading Railroad Company* case and which was held invalid.

(2) The fact that in the one case it is a tax and in the other a regulation, is of no legal significance as we are primarily interested in the result.

(F) In the case of *Port of Port Angeles v. Henneford*, 74 P. (2d), 1025, the business was local in nature though the tax was levied on the corporation engaged in interstate commerce. The court held that the dock companies' earnings from transporting goods arriving from other States are realized from operations in "interstate commerce" and hence not subject to State business and occupation tax, even though the business of the company was purely local in character.

(G) In view of the fact that this Honorable Court in the case of *Baldwin v. Seelig*, *supra*, held that the State of New York could not regulate the price of milk to be paid in Vermont for milk shipped into New York, the converse of this ruling should likewise logically follow, especially where the Commonwealth of Pennsylvania attempts to fix the price of milk in New York by indirection.

7. The opinion of the Court states that only a small fraction of the milk produced in Pennsylvania is shipped in interstate commerce and, therefore, the regulation is indirect.

(A) We respectfully submit that the amount of milk actually shipped in interstate commerce as compared to the amount of milk produced in the Commonwealth of Pennsylvania, is not the test with respect to the right of regulation. It has been aptly stated by the United States Supreme Court in *Public Utility Commission v. Attleboro Steam and Electric Company*, 273 U. S. 83:

"The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business, it is none the less beyond the power of the state because this may be a smaller part of its general business."

8. Even though the State statute in the instant case was not directed solely against interstate commerce, if it has that effect, it is invalid.

(A) The Learned Chancellor of the court below held:

"Undoubtedly the laws of Pennsylvania relating to milk control were not enacted for the primary purpose of regulating interstate commerce, but if they have that effect they are invalid as applied to such interstate commerce regardless of the proportion which such commerce bears to the total commerce of the state."

(B) The statute has that effect since it requires the respondent in the instant case to pay the milk producers not the agreed price but the *price fixed by the Commission* and also to post a bond to secure payment to producers of the prices fixed by the Commission and also to pay license fees, and hence the cost of the milk to it would be increased by the premium on the bond, by the license fee and by the increase in price ordered by the Commission. The effect of such regulation and such price fixing would be exactly equivalent to the imposition of a tax on the export of milk.

(C) The Milk Control Act provides that the milk can be purchased only subject to the minimum price established by the Milk Control Commission. That is, under the asserted authority the Milk Control Commission may fix and determine the price to be paid for milk which is bought, shipped and sold in interstate commerce.

(D) The statute denies the privilege of engaging in interstate commerce except to dealers licensed by the Commonwealth of Pennsylvania and provides a system which enables the Milk Control Commission to fix the profit which may be made in dealing with the subject matter of interstate commerce.

(E) It can readily be seen that though the statute was not aimed directly at interstate commerce, its effect on interstate commerce is obvious and hence invalid.

9. It has been the law of this Honorable Court for years in the past that State statutes fixing prices of articles in interstate commerce are invalid.

(A) Since it is conceded that the milk shipped to New York in the instant case is in interstate commerce and that the buying as well as the shipping constitutes one transaction, any effort on the part of the Commonwealth of Pennsylvania to establish a price minimum, regulates prices in interstate commerce.

(1) If the respondent is to pay the minimum price in Pennsylvania, plus the premium on the bond and the expenses incident to the movement of milk in interstate commerce, it must sell the milk in New York for a price equivalent to its overhead, plus a fair profit. *It must sell at a certain price in New York to continue to do business.*

(a) The Commonwealth of Pennsylvania is establishing the price, by indirection, at which milk can be sold in

New York. This, we contend, cannot be done directly and certainly cannot be done by indirection.

(2) In the case of *United States v. Seven Oaks Dairy Company*, 10 Fed. Supp. 995, it was held that where the business involved interstate commerce, State statutes regulating prices have been declared invalid as a direct burden on interstate commerce.

(3) In *Lemke v. Farmers Grain Company*, 258 U. S. 50, the Act attempted to regulate the price at which grain was bought, shipped and sold in interstate commerce. To the same effect is the case of *Shafer v. Farmers Grain Company*, 268 U. S. 189. These two cases are familiarly known as the "Farmers Grain Company cases" and in both instances this Honorable Court held that the regulation was invalid because it was a regulation of interstate commerce, directly affecting the price of the commodities moving in said interstate commerce.

(4) In *Stafford et al. v. Wallace et al.*, 258 U. S. 495, the court held:

"Accordingly a state statute which sought to regulate the price and profit of such sales was found to interfere with the free flow of interstate commerce was declared invalid as a violation of the Commerce Clause."

(B) Since it is obvious that the Commonwealth of Pennsylvania is indirectly regulating the price at which milk is to be sold in New York and since under the authority of the cases cited *supra*, such regulatory statutes are invalid, it follows that the price-fixing feature in the Pennsylvania statute must likewise be declared invalid with respect to milk shipped in interstate commerce.

(C) To substantiate our position that the Pennsylvania statute is a price-fixing statute, we call this Honorable

Court's attention to the requirement of a bond wherein a milk dealer must post a bond to secure payment to the producers of the prices fixed by the Milk Control Commission and not the agreed price between the distributor and the milk producer. To permit the present opinion to stand would mean that the very important case commonly referred to as the "*Minnesota Rate case*", in 230 U. S. 352, would be of no legal effect. In that case the United States Supreme Court established the principle and its limitations with respect to Federal and State power and laid down a basic doctrine for matters pertaining to State and Federal control.

10. All of the cases relied upon by the Commonwealth of Pennsylvania had no relation whatever to the purchase or sale of the commodity in interstate commerce. They were either inspection measures, quarantine measures or regulatory measures of the instrumentality through which interstate commerce might flow. This is quite different from the facts in the instant case where the regulatory measure directly controls the commodities in interstate commerce.

(A) We argued in our original brief that the regulatory measure in the instant case could not be considered an inspection law, in view of the innumerable Acts passed covering the period from 1853 to 1935, prohibiting the sale of impure and unwholesome milk and prescribing a host of regulations to insure such supply.

11. It might be desirable for the Pennsylvania Milk Control Commission to stabilize the dairy industry and it might be necessary for it to regulate the transactions of the respondent and other buyers of milk, similarly engaged and it might be necessary to protect the milk producers from fraud and to secure payment for them of fair prices for the milk actually sold, but there can be no justification for the exercise of the power which the Commonwealth of Pennsylvania is attempting to exercise when it does not possess that

power. Congress is amply authorized to pass measures to protect interstate commerce. These supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which greatly encroach upon the field of interstate commerce, placed by the constitution under Federal control.

12. Congress alone can deal with transactions in interstate commerce; its non action is a declaration that it shall remain free from burdens imposed by State regulation.

(A) A State statute in many instances can regulate interstate commerce in an inconsequential way when Congress has not acted, but where a State passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing direct burdens upon it, these regulations are invalid.

(B) In *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 196, the Commonwealth of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted of ferrying passengers and freight between Pennsylvania and New Jersey. This business was clearly in interstate commerce and the court held:

“Congress alone, therefore, can deal with such transportation; its non action is a declaration that it shall remain free from burdens imposed by state regulation. Otherwise, there would be no protection against conflicting regulations of different States, each regulating in favor of its own citizens and products and against those of other States.”

(C) To the same effect is the case of *Oklahoma v. Kansas Natural Gas Company*, 265 U. S. 298. The State of Missouri attempted to regulate interstate commerce. The court declared the Act unconstitutional and held:

“But Congress thus far has not seen fit to regulate it and its silence, where it has the sole power to speak,

is equivalent to a declaration that that particular commerce shall be free from regulation."

(D) To the same effect are the cases of *Pennsylvania Railroad v. Driscoll*, 198 Atl. 130; *Pennsylvania v. West Virginia*, 262 U. S. 553.

Authorities.

In *J. D. Adams Manufacturing Company v. Storen*, 58 Sup. Ct. 913, an Indiana Act imposed a tax on income regardless of the source. It appeared that the appellant in the case sold eighty per cent of its products in interstate commerce. This Honorable Court held that the income derived from interstate commerce cannot be taxed. It would, therefore, follow as a corollary that the products themselves could not be taxed. Applying this decision to the instant case, it would follow that milk shipped in interstate commerce could not be taxed and the income derived from said milk could likewise not be taxed. This is so even though the receipt of the income is of a local nature.

In the case of *Highland Farms Dairy, Inc., v. Agnew*, 300 U. S. 608, the late Mr. Justice Cardozo stated a principle in one sentence which controls the instant case. Mr. Justice Cardozo held:

"Highland in Washington may sell to High in Virginia and High may buy from Highland, at any price they please."

Why should not the same principle apply to the instant case? It being conceded that the milk bought was shipped in interstate commerce, the milk receiving plant, following out Mr. Justice Cardozo's statement, should be able to purchase milk from the producers in Pennsylvania at any price it sees fit. We are at a loss to understand how this Honorable Court arrived at the conclusion it did in the face of the very illuminating opinion of the late Mr.

Justice Cardozo in the *Highland Farms Dairy, Inc.*, case, *supra*.

In *Motor Transit Company v. Railroad Commission of California*, 15 Fed. Supp. 630, a State statute required each agent of a motor stage company selling tickets over highways of the State and across the State line, to procure a license and a five thousand dollar bond, conditioned on the faithful performance of the contract of employment. The court declared the Act unconstitutional as burdening interstate commerce. This regulation was clearly a safety regulation designed for the protection of the public and to insure extra precautions to it. This regulation was clearly of a local nature as it pertained to transportation in the State of passengers across the State lines. The instant case should likewise be governed by the decision of the *Motor Transit Company* case, *supra*.

To summarize briefly the distinction between the line of cases relied upon by the Milk Control Commission and the cases relied upon by the respondent, we quote from the opinion of the Learned Chancellor below (R. 29) :

“The distinction between *Munn v. Illinois*, *Townsend v. Yeomans*, and other cases relied upon by the plaintiff, on the one hand, and the *Farmers' Grain Company* cases and the present case, on the other, lies in the fact that in the former the regulation was confined to warehouses, elevators, or other agencies through which interstate commerce might flow, but whose activities were entirely intrastate. In the latter cases the statute sought to regulate the act of purchasing articles which were to be shipped in interstate commerce, and to prohibit such purchases unless made upon terms prescribed by the statute and administrative agencies. It is not the milk receiving plant operated by the defendant that the plaintiff seeks to regulate, but the business conducted by the defendant of buying and shipping milk.”

(A) We respectfully submit that this clear-cut distinction is in harmony with the law of this Honorable Court as has existed for years in the past, and a confirmation of said distinction will settle the law.

WHEREFORE, in consideration of the foregoing matters, Eisenberg Farm Products prays that a reargument be granted in the above captioned case in order that the grave matters of public concern herein involved may be further considered.

EISENBERG FARM PRODUCTS,
By THOMAS D. CALDWELL,
Counsel.

STATE OF PENNSYLVANIA,
County of Dauphin, ss:

Before me, a Notary Public in and for said State and County, personally appeared Thomas D. Caldwell who, being duly sworn according to law, doth depose and say that he is the attorney of record for Eisenberg Farm Products and is duly authorized to execute the foregoing petition and make affidavit thereto; that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief and that this petition is presented in good faith and not for the purpose of delay.

THOMAS D. CALDWELL.

Sworn to and subscribed before me this 23rd day of March, A. D., 1939.

JEAN R. GEER,
Notary Public.

[SEAL.]

My commission expires March 9, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 426.—OCTOBER TERM, 1938.

Milk Control Board of the Commonwealth of Pennsylvania, Petitioner,	} On Writ of Certiorari to the Supreme Court of Pennsylvania.
vs.	
Eisenberg Farm Products.	

[February 27, 1939.]

Mr. Justice ROBERTS delivered the opinion of the Court.

We are called upon to determine whether a local police regulation unconstitutionally regulates or burdens interstate commerce.

Pennsylvania, by an Act of April 30, 1935¹ has declared the milk industry in that Commonwealth to be a business affected with a public interest. The statute defines a milk dealer as any person "who purchases or handles milk within the Commonwealth for sale, shipment, storage, processing or manufacture within or without the Commonwealth." It creates a Milk Control Board with authority to investigate, supervise, and regulate the industry and imposes penalties for violations of the law or of the Board's orders issued pursuant to the law, and requires a dealer to obtain a license by application to the Board. Licenses may be refused, suspended, or revoked for specified causes. A requisite of obtaining a license is that the dealer shall file with the Board a bond conditioned for the prompt payment of all amounts due to producers for milk purchased by the licensee. The act empowers the Board to require the dealer to keep certain records and directs the Board, with the approval of the Governor, to "fix, by official order, the minimum prices to be paid by milk dealers to producers and others for milk." The Board may vary the price according to the production, use, form, grade or class of milk.²

The petitioner, the Milk Control Board, filed its bill in a Common Pleas Court to restrain the appellee from continuing to do business without complying with the statute. The respondent by its answer sought to justify failure to comply on the ground that it was engaged in interstate commerce. After trial the court dis-

¹ P. L. 96; 31 P. S. Sec. 684.

² The act was repealed by an Act of April 28, 1937, P. L. 417, but all proceedings under it were saved by Section 1203 of the later act. See *Commonwealth v. Ortwein*, 200 Atl. 859.

2 *Milk Control Board of Pa. vs. Eisenberg Farm Products.*

missed the bill. The Supreme Court of Pennsylvania affirmed the decree.³

The respondent, a Pennsylvania corporation, leases and operates a milk receiving plant in Elizabethville, Pennsylvania, at which it buys milk from approximately one hundred and seventy-five farmers in the neighborhood, who bring their milk to the plant in their own cans. There the milk is weighed and tested by the respondent and emptied into large receiving tanks in which it is cooled preparatory to shipment. This requires retention of the milk for less than twenty-four hours; it is not processed, and no change occurs in its constituent elements. The milk is then drawn from the cooling tanks into tank trucks operated by a contract carrier and transported into New York City for sale there by the respondent. The journey is continuous from Elizabethville to New York City. All milk purchased by the respondent at Elizabethville is shipped to and sold in New York. During the year 1934 approximately 4,500,000,000 pounds of milk were produced in Pennsylvania of which approximately 470,000,000 pounds were shipped out of the state.

The respondent contends that the act, if construed to require it to obtain a license, to file a bond for the protection of producers, and to pay the farmers the prices prescribed by the Board, unconstitutionally regulates and burdens interstate commerce. The State Supreme Court has held that the statute is a valid police regulation.⁴ The petitioner concedes that the purchase, shipment into another state, and sale there of the milk in which the respondent deals is interstate commerce. The question for decision is whether, in the absence of federal regulation, the enforcement of the statute is prohibited by Article I, Section 8 of the Constitution. We hold that it is not.

When the people declared "The Congress shall have Power . . . To regulate Commerce . . . among the several States," . . . their purpose was clear. The United States could not exist as a nation if each of them were to have the power to forbid imports from another state, to sanction the rights of citizens to transport their goods interstate, or to discriminate as between neighboring states in admitting articles produced therein. The grant of the power of regulation to the Congress necessarily implies the subor-

³ 332 Pa. 34; 200 Atl. 854.

⁴ See the opinion below, and *Coltervahn Sanitary Dairy v. Milk Control Commission*, 332 Pa. 15, 1 Atl. 2d, 775; *Keystone Dairy Co. v. Milk Control Commission*, 332 Pa. 15, 1 Atl. 2d, 775; *Rohrer v. Milk Control Board*, 322 Pa. 257, 186 Atl. 336.

dination of the states to that power. This court has repeatedly declared that the grant established the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority.⁵ But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority.⁶ One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable.⁷ These principles have guided judicial decision for more than a century. Clearly they not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. The difficulty arises not in their statement or in a ready assent to their propriety, but in their application in connection with the myriad variations in the methods and incidents of commercial intercourse.

The purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania. Its provisions with respect to license, bond, and regulation of prices to be paid to producers are appropriate means to the ends in view. The question is whether the prescription of prices to be paid producers in the effort to accomplish these ends constitutes a prohibited burden on interstate commerce, or an incidental burden which is permissible until superseded by Congressional enactment. That question can be answered only by weighing the nature of the respondent's activities, and the propriety of local regulation of them, as disclosed by the record.

The respondent maintains a receiving station in Pennsylvania where it conducts the local business of buying milk. At that station

⁵ The Minnesota Rate Cases, 230 U. S. 352, 399, and cases cited.

⁶ *Ibid.*

⁷ *Ibid.*, pp. 402-403.

4 *Milk Control Board of Pa. vs. Eisenberg Farm Products.*

the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York. If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable. Only a small fraction of the milk produced by farmers in Pennsylvania is shipped out of the Commonwealth. There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress.


None of the decisions on which the court below and the respondent rely rules the instant case. *DiSanto v. Pennsylvania*, 273 U. S. 34, involved a state law directed solely at foreign commerce; *Lemke v. Farmers Grain Co.*, 258 U. S. 50 condemned a state statute affecting commerce, over ninety per cent. of which was interstate and essaying to regulate the price of commodities sold within the state payable and receivable in the state of destination; *Shafer v. Farmers Grain Co.*, 268 U. S. 189, also dealt with a state law intended to regulate commerce almost wholly interstate in character. In *Baldwin v. Seelig*, 294 U. S. 511, this court condemned an enactment aimed solely at interstate commerce attempting to affect and regulate the price to be paid for milk in a sister state, and we indicated that the attempt amounted in effect to a tariff barrier set up against milk imported into the enacting state.

The decree must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER are of opinion that the Supreme Court of Pennsylvania properly concluded that under former opinions of this Court the questioned regulations constituted a burden upon interstate commerce prohibited by the Federal Constitution.

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